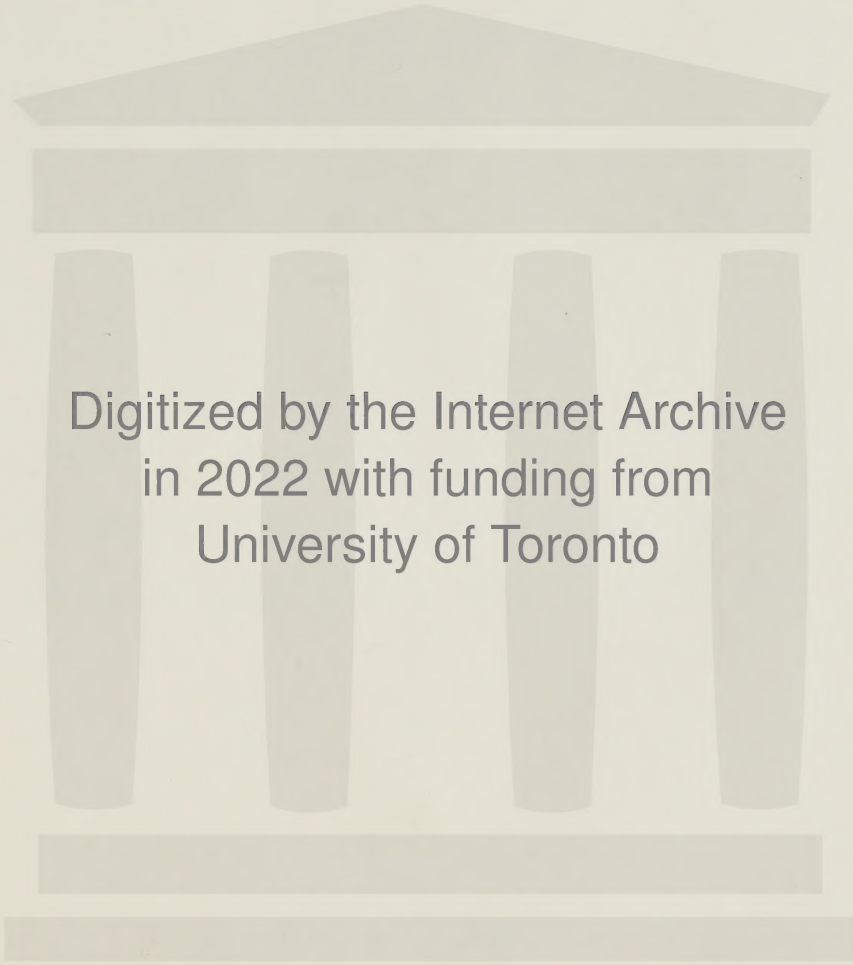

Ontario

Commission on
Freedom of Information
and Individual Privacy

Public Access to Government Documents: A Comparative Perspective

Research Publication 3

PUBLIC ACCESS TO GOVERNMENT DOCUMENTS: A COMPARATIVE PERSPECTIVE

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Research Publication 3

Prepared for the
Commission on Freedom of Information
and Individual Privacy

November, 1978

ISBN 0-7743-3225-5

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FOREWORD

The Commission on Freedom of Information and Individual Privacy was established by the Government of Ontario in March, 1977, to "study and report to the Attorney General of Ontario on ways and means to improve the public information policies and relevant legislation and procedures of the Government of Ontario, and to examine:

1. Public information practices of other jurisdictions in order to consider possible changes which are compatible with the parliamentary traditions of the Government of Ontario and complementary to the mechanisms that presently exist for the protection of the rights of individuals;

2. The individual's right of access and appeal in relation to the use of Government information;

3. The categories of Government information which should be treated as confidential in order to protect the public interest;

4. The effectiveness of present procedures for the dissemination of Government information to the public;

5. The protection of individual privacy and the right of recourse in regard to the use of Government records."

To the best of our knowledge it is the only Commission of its kind whose mandate embraces both freedom of information and individual privacy. The views of the public were embodied in the briefs submitted and in the series of hearings held in ten communities, and covering both Northern and Southern Ontario. In response to public demand, three sets of hearings, widely separated in time, were held in Toronto.

The views of the scholars and experts in the field are to be found in the present series of research reports of which this is number 3. These, together with the briefs submitted, constitute the backbone of our findings: the stuff out of which our Report will be made. Many of these stand in their own right as documents of importance to this field of study; hence our decision to publish them immediately.

It is our confident expectation that they will be received by the interested public with the same interest and enthusiasm they generated in us. Many tackle problem areas never before explored in the context of freedom of information and individual privacy in Canada. Many turn up facts, acts, policies and procedures hitherto unknown to the general public.

In short, we feel that the Commission has done itself and the province a good turn in having these matters looked into and that we therefore have an obligation in the name of freedom of information to make them available to all who care to read them.

It goes without saying that the views expressed are those of the authors concerned; none of whom speak for the Commission.

D. C. Williams
Chairman

PREFACE

Although there appear to be many political institutions and values which are common to the western liberal democracies, an examination of government information practices in these countries reveals a very diverse pattern of responses to the question of public access to government documents. At one end of the scale, Sweden has operated under a system of remarkable openness for the past two centuries. At the other end of the scale, the parliamentary democracies based on the Westminster model have developed information laws and practices which facilitate and encourage extensive government secrecy.

In recent years, pressure for legislated rights of citizen access to government documents has resulted in the adoption of freedom of information laws in some jurisdictions. In many others, proposals for legislation have been made and commissions of inquiry have been established. Indeed, the pace of development in these jurisdictions has rendered the Commission's task of examining "public information practices of other jurisdictions" a rather difficult one.

Professor Donald Rowat, a political scientist who has acquired an international reputation as an expert in these matters, has lightened this burden substantially by sharing his knowledge of these developments with the Commission in this research paper.

Professor Rowat, a member of the Department of Political Science of Carleton University, was an early participant in the freedom of information debate in Canada (see his "How Much Administrative Secrecy?" in The Canadian Journal of Economics and Political Science, Vol. 31, 1965, pp. 479-98) and is the editor of a forthcoming volume consisting of an international symposium on freedom of information laws. Professor Rowat will be well known to many readers for his previously published books on municipal government and the ombudsman.

Professor Rowat's paper provides a very helpful overview of recent developments with respect to freedom of information laws in an impressively large number of jurisdictions. More detailed studies of the manner in which specific problems are addressed in a smaller sample of jurisdictions have been undertaken by other consultants and members of the Commission's research staff. These studies will form part of further research reports which will be made available to the public upon their completion.

The Commission has resolved to make available to the public its background research papers in the hope that they might stimulate public discussion. Those who wish to communicate their views in writing to the Commission are invited to write us at the following address:

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It should be emphasized, however, that the views expressed in this paper are those of the author and that they deal with questions on which the Commission has not yet reached a final conclusion.

John D. McCamus
Director of Research

PUBLIC ACCESS TO GOVERNMENT DOCUMENTS:
A COMPARATIVE PERSPECTIVE

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INTRODUCTION

The most advanced democracies have been gradually coming to realize that they have inherited from earlier times a tradition of governmental secrecy which is incompatible with the people's right to know how they are being governed. The principle embodied in this tradition is that all administrative information is to remain secret except that which the government decides to release. This principle of "discretionary secrecy" means that the government of the day has the discretion to keep secret whatever information it wishes, and is free to do so to protect its own partisan interests. It also means that the public have no right to see or use the vast store of documents and data which have been paid for with their taxes, and do not have complete information upon which to base their judgments on public issues or their control over the government.

By now, several democratic countries have reached the conclusion that this principle is wrong and ought to be stated the other way around: all administrative information is to be open to the public except that which needs to be kept secret as defined by law. Such countries have therefore adopted laws which establish the principle of governmental openness, and which provide a public right of access to

all administrative documents and information except for specific matters that are narrowly defined.

Such laws, of course, involve a radical shift in the balance between governmental secrecy and openness. Hence, governments contemplating a move toward greater openness have much to learn from a study of experience with these laws, and of proposals for similar laws in other countries.

The country having the longest experience with the principle of openness is Sweden. Its law on public access dates back to 1766. Other countries have adopted a similar law, but in much more recent times. Those having adopted one long enough ago to have had some experience with its actual working are: Finland (1951), Denmark (1970), Norway (1970) and the United States (1966). Countries in which important recent developments toward greater public access have taken place are: Austria, France, the Netherlands, the United Kingdom and Australia. Austria adopted provisions on public access in 1973, France adopted a new law on the subject in July 1978, and bills are now before the legislatures of the Netherlands and Australia.

This report therefore covers the experience and developments in these countries, as well as recent developments at the federal and provincial levels in Canada, in order to see what lessons can be learned for application to the situation in Ontario. It is based

partly on the author's direct observations and interviews during study tours in all of the countries concerned except Austria and Australia, in the summers of 1973 and 1977. The report concludes that, as elsewhere, a strong law on public access would be desirable for Ontario, and spells out the main features that such a law must have.

CHAPTER I

COUNTRIES WITH A RIGHT OF PUBLIC ACCESS

A. Sweden

For over two hundred years the Swedish constitution has provided for open access to official documents and full information to any citizen about administrative activities. This provision was first adopted in 1766, as part of the Freedom of the Press Act, one of the country's four basic constitutional laws.[1]

Such a provision is so alien to our own tradition of discretionary secrecy that we immediately think of circumstances under which governmental secrecy is desirable. How can such a provision work successfully if there are no limitations on its application? The

1 The provision arose out of the intense struggle in the last half of the 18th century between the main two political parties, the Hats and the Caps. When the Hats were defeated in 1765 after a long term of office, the Caps inserted the principle of public access in the Freedom of the Press Act because of their frustration over administrative secrecy as well as press censorship under the previous regime. After a period of absolutism between 1772 and 1809, parliamentary government and the Freedom of the Press Act were re-established, and the principle was soon fully accepted as part of the normal political life of Sweden.

answer is that there are limitations, and these are provided for in the constitution itself. It is only that the principle has been reversed: whereas in most countries all administrative documents are secret unless specific permission is given for their release, in Sweden they are all public unless legal provision has been made for them to be withheld.

The Swedish constitution recognizes that there are certain types of documents that ought to be kept secret, and lists them as exemptions from the general rule. The actual wording is as follows:

> "To further free interchange of opinions and enlightenment of the public every Swedish national shall have free access to official documents. The right to have access to official documents may be restricted only if restrictions are necessary considering, 1) the security of the Realm or its relations to a foreign state or to an international organization; 2) the central financial policy, the monetary policy, or the foreign exchange policy of the Realm; 3) the activities of a public authority for the purpose of inspection, control, or other supervision; 4) the interest of prevention or prosecution of crime; 5) the economic interests of the State or the communities; 6) the protection of the personal integrity or the economic conditions of individuals; or 7) the interest of preserving animal or plant species. 2

It will be noted that all of the general circumstances traditionally used as arguments against free access to administrative information are covered by this list of exemptions. It should also be noted that in general the right of free access is to prevail and that this right shall be subject, as the constitution says, "only" to the exceptions

2 Constitutional Documents of Sweden, (Stockholm: the Riksdag, 1978), p. 18.

listed. The constitution goes on to say that the specific cases in which official documents are kept secret shall be "closely defined" in a special statute. As one might expect in a modern welfare state, this law, called the Secrecy Act, spells out an impressive list of matters that must be kept secret. But, as an eminent Swedish scholar, Professor Nils Herlitz, has pointed out:

> "The detailed catalogue of the Secrecy Act has also a considerable effect e contrario. Since we have modern legislation providing for secrecy when it is necessary ... it follows that where publicity is required, it must be properly and conscientiously adhered to. And publicity has nowadays a very strong support in public opinion, as a keystone of our constitutional system. It is a considerable and effective force felt in every section of social life." 3

A full appreciation of the impact of the Swedish principle of open access can be gained only by giving some examples of the extensiveness of its operation. It applies, for example, to public documents kept by all sorts of administrative agencies, from government departments to police officers, administrative tribunals and local governments. Moreover, anybody is entitled to ask for documents; he does not have to show that he has a legal interest in seeing them nor is he obliged to say for what purpose he wants them. To make sure that agencies do not purposely delay in answering a request, the constitution provides that a requested document shall be "made available immediately or as soon as possible", and the courts in their judgments have taken this rule seriously.

3 N. Herlitz, "Publicity of Official Documents in Sweden", Public Law (Spring, 1958), 53.

The definition of "official document" includes not only those prepared but also those received by a public authority. And their availability to the newspapers has been organized as a routine service:

> "Every day, in the great offices in Stockholm, for instance, documents which have been received will be brought to a room where representatives of the newspapers are welcome to see them. A representative of the leading news bureau will never fail to appear, and through him a flood of news will go to the newspapers and to the general public.
>
> The purpose is this. Just as publicity in the courts all over the world makes it possible for everybody to know how justice is administered, the publicity of documents has the same effect insofar as documents reflect the activity of the authorities; the publicity shall provide (as the Constitution says) 'general enlightenment'." 4

The Swedish tradition of openness is so firmly embedded that the Secrecy Act, government regulations, the courts and the ombudsmen for civil and military affairs all place great weight on the need for free public access to administrative documents. For instance, in the Secrecy Act itself and in government regulations, the secrecy of

4 Ibid., 54-5. In 1973 I visited Sweden to study its unique system of openness, and was lucky enough to accompany a reporter who worked for the Swedish equivalent of Canadian Press, as he made his daily rounds of three government departments. To my amazement, all incoming and outgoing documents and mail were laid out in a special press room in each department for an hour every morning for reporters to examine. If my reporter wanted further information on a case, he simply walked down the hall to look at the department's files. No special permission was needed. Such a system of open access is so strange to us as to be almost unbelievable. Professor Herlitz has noted that when he would give a speech about it in other countries, he was often amused by the reaction of his audience. It was clear that they pondered questions such as these: "Is this man unable to express himself intelligently in my language? Or is he mad?" Ibid., 50.

documents is valid for only a specified period of time, and the restrictions are not valid for documents preserved in the courts. The Secrecy Act, far from stating that the documents of the Foreign Office or of the armed services are to be kept secret altogether, carefully enumerates those which may be kept secret temporarily. And in many cases the ombudsman for military affairs has insisted upon publicity of information unjustifiably withheld by the military establishment. It is also noteworthy that most of the secrecy exemptions do not refer to documents containing administrative decisions on individual cases. Here the rights of persons having an interest in seeing the documents have been upheld by the courts in a great number of cases. The principle of free access to documents is also upheld in a positive way by regulations which require special arrangements to facilitate easy access by the press, scholars, interested parties and the public generally. Most agencies, for example, keep up-to-date diaries in which information about documents received is easily available.

Another important feature of the Swedish system of openness is that under the Freedom of the Press Act, a reporter or editor cannot be compelled to disclose his source of information. Instead, the editor takes direct and personal responsibility before the law for what he reveals. The only exception is when the informant has disregarded his statutory duty to keep certain matters secret. In view of the recent controversies over this matter in Britain and the United States, the Swedish experience is instructive; the principle of protecting news

sources has been an important device for providing unofficial access to information wrongfully withheld from the public.[5]

1. The Limitations on Public Access

Because the success of the Swedish system largely depends on the way in which the restrictions on full openness are prescribed and applied, let us look at these restrictions in greater detail. An important general point to note is that they are not left as a brief general list of categories of exemption, as they are in the constitutional law or in the laws of most other countries having a right of access. Instead, they are spelled out in great detail in an ordinary law, the Law on Curtailment of the Right to Demand Official Documents (commonly called the Secrecy Act), which of course is inferior to the constitutional law. This has the effect of narrowly restricting the types of documents which may be kept secret, since they are not left as vague classes of documents which officials could interpret as covering almost any kind of document. Thus a long, specific list of exceptions to public access is actually less inhibiting to openness than is a short, general list. The Secrecy Act contains 42 long sections exempting very specific kinds of documents from disclosure.

5 See Hilding Eek, "Protection of News Sources by the Constitution", Scandinavian Studies in Law, 1961 (Stockholm), 11-25.

In addition, supplementing the Secrecy Act is a large number of regulations, some of which contain lists of documents extending beyond thirty paragraphs. While some of the exemptions still seem to be too general (e.g., documents concerning "the realm's relations to foreign powers"), most of them are very specific.

Another important point is that some of the exemptions qualify the description of the class of document exempted by saying that a particular document in that class is to be kept secret only if it protects a specified interest. For instance, information on military craft and installations can be withheld only if disclosure could "harm the defence of the realm or otherwise entail risk for its security". Other examples of interests which qualify class descriptions are: damaging "the national economy or the proper progress of industry", and hindering "the detection of crime or the investigation of criminal cases". Obviously, many documents which might seem to fall under a particular class of exemptions do not need to be kept secret because their release would do no harm. And the device of stating the interest to be protected for each class of document permits large numbers of such documents to be released. A similar limitation to many of the exemptions protecting personal or corporate privacy is that the exemption does not apply if a document will not injure the person or corporation mentioned in it. Some exemptions may be waived by the individual for whose benefit protection is given, and others recognize that particular parties may have a special claim to access.

Another characteristic of the exemptions is that most of them contain a limitation on the maximum period for which the documents can be withheld. Although this period is usually short, some documents (e.g. those relating to criminal law enforcement or containing information of a highly personal nature) may be withheld for seventy years. Although Cabinet minutes are often released within two years, those dealing with sensitive issues usually have a maximum period of fifty years, as do documents concerning foreign relations, national security and defence (though some military information can be withheld for a longer unspecified period). Much other material is protected for only five or even two years.

It is also noteworthy that instead of a general exemption for personal privacy there are specific exemptions, including certain types of applications or forms (such as tax returns and pension claims), documents prepared by particular authorities or individuals (such as doctors and the prison and probation authorities) and other types of personal and economic data on citizens. Hence, a large quantity of information on individuals is not publicly available, such as address lists, the actual decision on a person's tax return or on his application for a grant or benefit. Also exempt are communications from persons making a complaint or a comment on another person or group, certain information on another person's income or the structure of his business, and concerning the qualifications or conduct of civil servants. Clearly, though the Swedes have felt that the balance between personal privacy and the public's right of access

to information should be tipped in favour of the latter, much personal information is withheld.

In recent years, moreover, they have become more concerned about the protection of privacy, and especially the threat to privacy caused by the centralization of public and private computer information held on individuals. This has resulted in the Swedish Data Act of 1973. Before its adoption anyone could get from the courts, through the use of a computer, a list of all divorced women in Sweden. It was then possible for a commercial firm to send such women an advertisement for a new husband. Such invasions of privacy were prohibited by the Act of 1973, which restricts the use of personal data held in all computers, both public and private, and provides for the enforcement of the Act through a supervisory board.

An important reason why the extensiveness of public access in Sweden does not create serious problems regarding the invasion of personal privacy is that Sweden has a very responsible press. The main press organizations are members of a press council, which has developed a code of ethics and has appointed a "press ombudsman" to receive complaints against the press. As a result, the news media voluntarily refrain from printing or broadcasting the names of accused persons who might be innocent, or of citizens when this would invade their privacy. For instance, the names of people who complain to the parliamentary ombudsmen are not ordinarily given in news stories. On the other hand, the press obtains from the tax department and

publishes the names of movie stars, businessmen and officials who have the highest incomes in Sweden, as a matter of public interest.

An important limitation on access to administrative documents in Sweden has been created by the distinction between official documents and internal working papers. An understanding of this distinction is vital because of the false arguments used in other countries by some opponents of access. They claim that public access would seriously interfere with the day-to-day work of administration, and would inhibit public servants from giving frank advice to their superiors for fear it would be made public. It is important to realize that there is no right of access to internal notes, drafts and tentative working papers. The right applies only to completed documents or documents sent from one authority to another. Thus normally the right of access exposes to public view only an official's fully considered advice in the form of a finished document. This is not likely to inhibit his frank opinions, which can still be given to his superior confidentially if necessary. Indeed, knowing that his written advice on an important matter may be made public, he is likely to think it out more carefully and to present a view that is not only more clearly argued and more fully supported but also more objective. In short, his advice will be better.

Since the distinction between an official document and a working paper cannot always be drawn easily, no doubt officials in Sweden sometimes take advantage of this fact to keep information confidential

in the form of an exempt working paper which, if defined as an official document, would be publicly available. Much administrative information at the policy-making level within ministries is thus kept confidential, although many policy documents are released which in other countries would be considered internal documents. For instance, although ordinarily ministry documents on a policy matter are not publicly released until a decision has been made by the cabinet, at that time all of the supporting documents, including those containing the views of senior officials, are released with the decision.

2. The Significance of the Access Principle

An important consequence of Sweden's adoption of the principle of public access is the impact on the administration itself. Professor Herlitz describes this impact in the following terms:

> "In every step an authority takes, it feels that it is under public control, under the imminent danger of having its steps discussed and criticized. The publicity is always in the minds of the officials and makes them anxious to act in such a way that they will not be exposed to criticism. This situation will, in a way, make them cautious, perhaps sometimes over-scrupulous. But on the other hand, they will feel a certain amount of confidence. They need not be exposed to vague suspicions, since there is always an opportunity to control their work. And, after all, the wind which sweeps from without over the work of the authorities is not always harsh and unfriendly. If publicity is a plague to authorities which are inclined to take wrong steps, it may also give considerable support to other authorities, provide them with good information and prevent their being deceived by false information and unfounded pretensions. In a word, publicity creates, when it is effective, quite a

> peculiar atmosphere of openness and confidence in which administration has to work." [6]

Regarding the significance of the access principle to the citizens in a democracy, a former Swedish ombudsman has said that he regards it as much more important than the office of ombudsman.[7] And Professor Hertlitz concludes:

> "Our judgment on public affairs is facilitated; the public debate is given a firmer basis, whether we judge what the authorities think, or what they have done, or what they should do...
>
> It would be an understatement to say that in Sweden publicity is generally and highly estimated. It would be more exact to say that it is regarded as indispensable. Whilst, in the eyes of other nations, publicity may look impossible and incredible, most Swedes, including many high lawyers, regard access to official documents as something like a natural right and believe that it has a counterpart in all civilized countries." [8]

Professor Anderson, who has studied the Swedish system of openness at first hand, notes that scholarly and official opinion in support of it seems to be unanimous.[9]

6 Herlitz, op. cit., supra, note 2, 56.

7 In a letter to the author, 1966.

8 Herlitz, op. cit., supra, note 2, 55, 58.

9 See S. Anderson, "Public Access to Government Files in Sweden", American Journal of Comparative Law XXI, 3 (Summer 1973), 419 at 427.

3. Concluding Comments

Sweden's long experience with the principle of openness indicates that it changes the whole spirit in which public business is conducted. It causes a decline in public suspicion and distrust of officials, and this in turn gives them a greater feeling of confidence. More important, it provides a much more solid foundation for public debate, and gives citizens in a democracy a much firmer control over their government.

Those who fear that public access to documents will create too much administrative openness should keep in mind that even in Sweden there is still considerable administrative secrecy. In the first place, the law provides that certain matters may be kept secret to protect the public interest and personal privacy. Second, the important distinction between official documents and working papers ensures that the administration will not become immobilized by premature access or publicity. Third, there is a constant pressure by the government and officials to keep matters confidential for their own convenience. Even in Sweden several areas of administration, such as the Ministry of Foreign Affairs, publicly owned share companies and local government, are not as open to the public as some observers think they should be, and the propensity of officials to withhold information still requires many appeals each year to enforce access. Hence there has been little danger of too much administrative openness.

One of the favourite claims advanced by those who oppose open access is that Swedish officials evade the access law on a large scale by passing information to one another orally instead of committing it to paper. This claim, of course, is impossible to document, but unfortunately it is similarly difficult to disprove. My own view is that it is mainly a myth dreamed up by opponents of administrative openness which is based on false fears and on two serious misconceptions. The first misconception is a lack of understanding that in Sweden there is no right of access to working papers. This means that it is quite possible to transfer confidential information in written form within a department or the ministries. The second misconception is the assumption that there is a great desire on the part of Swedish officials to withhold non-secret information. My interviews with Swedish officials have led me to believe that, on the contrary, they are so imbued with the tradition of openness that they automatically expect as much information as possible to be released. It is true that a few matters of a delicate nature, such as personal recommendations, are dealt with orally or by telephone rather than committed to paper, as they would be in any country. But my Swedish informants felt that in this respect the administrative practices in Sweden were not much different from those in other countries. In fact, one of my informants, a departmental administrator, insisted that the tradition of documenting everything was so strong in Sweden that officials do not transfer information by telephone or interview as much as they should, or even as much as officials do in other countries.

Those who argue that the attitude of openness with which Swedish officials are imbued cannot be created quickly are probably right. A long-standing tradition of secrecy cannot be reversed overnight simply by passing an access law. The law must be accompanied by a thorough program of administrative training in the new practices it requires. Such programs were conducted in Denmark and Norway when their new access laws were adopted, and this goes far toward explaining the successful implementation of these laws. At the same time, because of the natural tendency for officials to withhold information for their own convenience, the public and the press must be constantly vigilant to enforce their rights of access. This vigilance must be supported by a thorough knowledge of their rights. Hence the provisions of the law and the key decisions interpreting these provisions must be widely known among not only officials but also news reporters and the general public. To meet this need in Sweden, Mr. B. Wennergren, a former ombudsman, produced a short book on the provisions and key interpretations of the laws on public access. In an excellent comparative article, his conclusion regarding the Swedish experience is that the right of access is very seldom abused, and that it does not impede the daily work of administration "to any degree worth mentioning".[10]

10 See B. Wennergren, "Civic Information - Administrative Publicity", International Review of Administrative Sciences XXXVI, 24 (1970), 243 at 249.

B. The Other Scandinavian Countries

Because Finland was part of Sweden in the 19th century, it has inherited much of Sweden's tradition of openness, but in a considerably weaker form and without a constitutional right of public access. In fact, it was not until 1951 that Finland's practices and regulations on the subject were consolidated into a law, the Law on the Public Character of Official Documents. Denmark and Norway have also adopted laws on public access to official documents but only in very recent times. Oddly, both countries passed laws on the subject in the same year, 1970, though Denmark had already adopted a law in 1964 providing for a citizen's right of access to his own case. The Act of 1964 became part of its more general law of 1970.

A comparison of the legal provisions in these three Scandinavian countries with those in Sweden reveals some significant differences.[11] The main one is that their provisions for public access are weaker and less far-reaching than Sweden's, while their provisions for secrecy are more general and hence broader. In Sweden the law that establishes the general right of access, the Freedom of the Press Act, is part of the constitution, which means that it can be amended only

11 The following comparative survey is based on my general comparative report in the forthcoming book which I edited, Administrative Secrecy in Developed Countries (London: Macmillan; and New York: Columbia University Press).

if the amendment is repassed after an intervening election. The Secrecy Act, on the other hand, which spells out the types of documents that are to be kept secret in accordance with the general categories listed in the Freedom of the Press Act, is only an ordinary law. Except notably for the categories of foreign affairs and national defence, it lists these exceptions in narrow and limiting detail. In Finland, though the public access law of 1951 is an ordinary law, the more detailed secrecy provisions are in the form of a decree, which has a lower legal status. These provisions are much briefer and more general than in Sweden, and hence leave more discretion to officials and less specific grounds for appeal. The Public Access Acts in Denmark and Norway are also ordinary laws, which include general exemptions from access. These exemptions, too, are much broader than those in Sweden's Secrecy Act.

The Danish and Norwegian Acts do not provide as full a right of access as do the laws for the other two countries. In Denmark and Norway reporters or citizens must identify and request specific documents. This means that they must know that a document exists before they can ask for it. In Denmark, since they do not have access to departmental registers, they may not even know that a document exists. These are serious limitations on public access. They help to explain why the Danish national press bureau does not consider it worthwhile to send reporters on daily visits to the ministries. An official in the Danish Ministry of Justice informed me that, since the adoption of the Danish and Norwegian Acts in 1970, his ministry had received only

a handful of requests for documents from the press and the public, while in Norway every morning a reporter would call at the Ministry of Justice and ask to see several documents. However, the Danish Act is to be reviewed by a parliamentary committee, and an amendment may grant access to departmental registers.

Though the laws in Denmark and Norway are more restrictive than those in Sweden or even Finland, when these laws were adopted a serious attempt was made to implement them liberally. For example, officials in the Danish and Norwegian Ministries of Justice conducted training sessions for public servants in other ministries and agencies, and gave them guidelines on the changes in practice needed to give a liberal interpretation of the new law. Both ministries have placed advertisements in all daily newspapers to inform citizens of their right of access to official documents. A Norwegian advertisement in 1975 featured a cartoon of four citizens poking into a bureaucrat's files, and gave a simplified explanation of the Act. It pointed out that a citizen does not have to give a reason for wanting to see a particular document; "pure curiosity is a satisfactory ground," it said, and added that if his request is refused he can appeal to the ombudsman or a court.

It is noteworthy that all three countries, like Sweden, have established by law the basic principle that the public has a right of access to most official documents. In all four countries this right is enforceable through an appeal to both the courts and the

ombudsmen (and in Finland and Sweden to the Chancellor of Justice). Although the provisions regarding documents which may be kept secret are much more limiting in Sweden, in all four countries the general areas of secrecy are basically the same: foreign affairs and national security, the prevention and prosecution of crime, protection of personal privacy, internal working papers, and some government and business economic matters.

1. Types of Authorities

One of the most significant differences between Sweden and the other Scandinavian countries is found in the types of authorities that hold the administrative documents. In Sweden governmental departments are separated from the ministries under boards, and have much the same degree of independence as public corporations or regulatory bodies in other countries. As a result, when a department wishes to communicate formally with any ministry, it must produce a document which is then sent through the mail to the ministry, and this makes it publicly accessible. Thus even policy advice at a high level from a department to its relevant minister becomes public knowledge, whereas in other countries such advice is normally passed from a department to its minister as an internal document. This fact is of great importance in contributing to the openness of the Swedish administrative system.

On the other hand, as in other countries, since the ministers as a

collegial executive are considered to be a single unit, documents passing from one ministry to another before decisions are taken are regarded as internal working documents and therefore not accessible. In fact, because of their separation from the departments, the ministries act more as a single unit than in most other countries. For this reason, certain high-level types of policy documents are kept confidential before a cabinet decision is made that might be released at an earlier stage in the other Scandinavian countries.

The separation of departments from ministries may help to explain why so few documents on diplomatic relations are made publicly available. The Ministry of Foreign Affairs has no corresponding department to send it completed policy documents. Also, in the Secrecy Act documents on foreign relations are given a broad exemption. Even so, some Swedish scholars have told me that the withholding of such documents is based partly on tradition and practice, and that a more vigorous enforcement of the Freedom of the Press Act by the press and the public could make the Ministry of Foreign Affairs much more open to public scrutiny. This situation is evidence that, even in a country which has a liberal tradition of openness, there is a constant pressure from the government to withhold information for its own convenience, and that the press and public must be continuously vigilant in enforcing the law.

Other types of authorities that hold information are public corporations and local governments. In Sweden there is an important

legal distinction between ordinary public corporations and share companies in which the government holds the majority of the shares. Since the latter are more like private companies, they need not adhere to the access provisions of the Freedom of the Press Act. Several Swedish informants told me that one of the main reasons the government has been setting up public corporations as share companies is to prevent public access to their documents. Local government has also been an area of controversy in Sweden. There has been a tendency for local officials to withhold information, and in some city governments the executive committee has refused to release the reports of committees until they have been reviewed by the executive committee itself. In Denmark, too, local government presents a problem. Under the new Danish law, a whole city government is regarded as a single authority, and therefore reports passing from one part to another are regarded as internal papers. In the case of a huge city government such as Copenhagen, this can cause much administrative information to be withheld from the public. However, the dealings of local governments with the Ministry of Interior must now be released. Local governments in Finland have a stronger tradition of openness, especially the government of Helsinki, where the person who was mayor for many years was a former newspaper man.

2. Types of Requesters

In all four Scandinavian countries, one of the most difficult problem

areas concerns requesters who wish to see the documents in their own cases. The courts and the ombudsmen have often been involved in interpreting the law in such cases, especially regarding medical records and the records of persons accused before the courts. In Sweden, for instance, the Supreme Administrative Court decided that the records of the health insurance organization, which used to be considered private, must be made publicly available. As a result, a private citizen could then find out what illness his neighbour had. A parliamentary committee on computers and privacy has since proposed an amendment to the Freedom of the Press Act to prevent such invasions of privacy. A similar problem dealt with by the Court has been whether patients should have access to their own medical records held by doctors in public hospitals. This is a particularly delicate problem in the case of mental patients. In a series of cases the Court has mainly supported the doctors who favour confidentiality, but in cases where doctors were keeping medical records private for their own convenience, it has decided against them in order to preserve greater openness. Doctors may not keep private notes, and all their information must be on the record. However, they may destroy patients' records after ten years, a fact which may be unfortunate for medical research. The openness of medical records to employers also presents a problem, since an employee's previous medical (especially mental) history may influence an employer's decision. Some people feel that this is an invasion of privacy, while others regard it as relevant information in hiring.

In Finland, the Supreme Administrative Court has similarly decided that a doctor can refuse medical documents to a patient, or to a relation if the patient has died. A case in 1966 concerned the right of a man to get information on his wife and dead son. The decision was that he could get it regarding the son, but not his wife without her consent. Another case, decided by the ombudsman in 1970, concerned the rights of the parents of a boy killed in a robbery to get information regarding the cause of death. The doctor in the hospital had refused this information, but the ombudsman concluded that they should have the right to get it. Two decisions of the Supreme Administrative Court in 1971, however, indicated that doctors could refuse such information, with the result that the law is now uncertain on the subject. The question of whether suspects of a crime should have access to the documents in their own case has also required legal interpretation. Similar problems of interpretation exist in Denmark and Norway. In such cases, the ombudsman and the courts have had to try to balance the true interests of the requester of the documents against the harm that might be done to the public interest.

Another important group who request governmental documents is news reporters. The effectiveness of an access law depends heavily on the organization, traditions and practices of the press. This is illustrated by the differences in this respect among the four countries. In Sweden, the national press bureau sends reporters on daily rounds of the ministries and most important departments and

agencies. It has about fifteen reporters who cover about seventy ministries and departments. As a result, the bureau sends out annually about 5,000 government stories on the national wire and about 40,000 to local newspapers. Reporters in Norway and Finland (but not Denmark) also do daily rounds of ministries but there the coverage is not so thorough. In Finland, for instance, during my visit in 1973 reporters from the national press bureau were making daily rounds to only three ministries: Interior, Transport, and Social and Health. Finnish reporters do not call daily at the ombudsman's office, and rely mainly on his press releases and annual report for news stories on cases. Some of my informants stated that the main reason the press bureau had not extended the system to other ministries was the cost of extra staff and of photocopying documents, while others argued that it was simply a matter of tradition and inertia on the part of the press bureau. Another factor, however, may be the reluctance of the government to provide facilities for the press in each ministry. In Sweden, most ministries and departments provide a press room with a typewriter, and all incoming documents and mail, even from private citizens, are made available to the reporters.

Since the media are interested in current news, they of course rely heavily on oral information obtained quickly from officials by personal interview or telephone. The easy accessibility of oral information is therefore of prime importance to the press. Even before the new access Acts were passed in Denmark and Norway, press

relations with officials were very good. Partly for this reason, reporters and news organizations have not had to appeal many cases under the new laws. A more important reason, however, may be that the very existence of the access laws has given reporters a lever with which to press for information. The ability to threaten to ask for documents in a case no doubt forces officials to be freer in offering information orally and to be surer that their information is accurate.

An interesting question taken up by the Danish ombudsman soon after the Act of 1970 came into effect was whether an official must respond to a reporter's oral request by telephone to see a particular document, or whether he could instead insist that the request be made in writing. Since a reporter is likely to need immediate access to a document for a news story written the same day, the ombudsman concluded that, to reporters, a delay of information amounts to a denial of information, and that therefore a request by telephone should be sufficient, as had already been stated in the guidelines issued by the Ministry of Justice.

This example of a Danish official stalling on a press request for documents is unusual, however. Generally Danish officials have been cooperative in responding to such a request, though some reporters still complain that they cannot get copies of documents in time for deadlines. Two outstanding examples may be given of information revealed through the press soon after the Danish Act went into effect.

In the first case, the press demanded and got documents containing proposals made to the government by the SAS airline, a Scandinavian government corporation. Formerly, these documents would have been secret. The other was a case in which a newspaper published accusations against local public welfare homes. The government asked the homes for reports in response to these accusations, and the newspaper successfully requested and published these reports. Since the reports showed many of the accusations to be false, their publication helped to clear the air, and may be regarded as a desirable public service. Most Danish reporters have copies of the Act and know its contents, but one of my informants felt that they need a more detailed guide to the meaning of the provisions regarding what may be kept secret.

In Sweden and Finland an important buttress to press access is the legal requirement regarding the non-revelation of news sources. News reporters cannot be compelled by the courts to reveal the name of a person who gave them information, even if this person was a public employee. In Sweden, if there is a "leak" of information, a senior official is not even allowed to ask a reporter from whom he got his information, and the official may not conduct a search for the name of the offending junior official, unless the information was clearly in the secret category under the law. This constitutes a powerful protection against governmental withholding of information. It is in marked contrast to the ambivalence of court decisions on this subject in the common-law countries, though several American states have

similar "shield" laws for reporters.

3. The Appeal Procedure

In all four countries, as in other countries, the originator of a document may indicate its security classification by placing a secrecy stamp on it. But the difference is that neither he nor his superiors may make the final decision as to its secrecy. It must fall in the category of matters which are listed as secret according to law, and if a reporter or a private citizen disputes the classification he may appeal to an independent authority for a decision on whether the document should be released.

It is important to note that in the Scandinavian countries there is more than one authority to which an appeal can be made. In Finland and Sweden the appeal can be taken to the Supreme Administrative Court, to the ombudsmen, or to the Chancellor of Justice, while in Denmark and Norway it can be taken to the ordinary courts or to the ombudsman. The differences between the types of appeals that go to a court and to an ombudsman (or to a Chancellor of Justice) usually depends on the seriousness of the case. For instance, a newspaper or business firm would usually take a case to court, while a reporter or a private citizen would usually complain to an ombudsman. There are far more appeals in Sweden than in the other Scandinavian countries, and most of them are made in the form of complaints to the

four parliamentary ombudsmen. For instance, in 1972 the Swedish Supreme Administrative Court heard twenty-five appeals against the withholding of documents, while the ombudsmen received over 100 such complaints. Probably the main reason for the greater number of appeals in Sweden is the longer tradition of openness and hence the greater awareness by the press and public of their rights.

C. The United States

The United States has enjoyed a stronger tradition of governmental openness than that of most other countries. Nevertheless, until very recent years the release of administrative documents was largely at the discretion of the chief executive, whether federal or state, and the heads of his departments and agencies.

At the federal level, it was not until 1946 that provisions were included in a congressional law, the Administrative Procedure Act, which attempted to require the routine disclosure of government-held information. It stated as a general principle that there should be free public access to administrative documents except for certain broad exemptions. However, the attempt failed partly because of the vague language of the exemptions. Thus the Act exempted from disclosure records involving "any function of the United States requiring secrecy in the public interest" as well as "information held confidential for a good cause found". Moreover, only "persons

properly and directly concerned" were entitled to procure certain public records, and there was no provision for judicial remedy. The attempt also failed because the Act was soon followed by the period of the Cold War in the 1950's, in which the desire to protect national security caused almost a mania among government officials for keeping information secret. The result was an unnecessary over-classification of millions of government documents.

This finally caused an opposing reaction by the press, the public and Congress. One result was that in 1961 President Kennedy instituted a system for automatically de-classifying most secret documents at the end of twelve years, and in a famous letter to his secretaries stated that "any official should have a clear and precise case involving the national interest before seeking to withhold from publication documents or papers fifteen or more years old."[12] Even before that, the maximum period for holding most classified documents was only twenty years, while the period required by most other countries was fifty years.

1. The Freedom of Information Act

The most important change, however, came with the passage of the

12 See C.P. Stacey, "The Access Problem", International Journal 20 (1964-65), 52.

Freedom of Information Act in 1966. This Act, replacing the provisions of 1946, stated unequivocally that public access to most documents was to be the general rule. More significantly, it listed what types of documents could be kept secret, in nine general categories of exemption, and provided for a means of public appeal against withholding. These provisions finally established the Swedish principle of openness: disclosure is the general rule, and documents may not be withheld unless they fall under one of the exemptions specified by law. The categories of exemption, however, are much broader than those of Sweden and hence leave more room for official discretion and judicial interpretation.

The Act required many more records to be either published or indexed and to be made available for inspection and copying, such as those containing final decisions. Other records, as in Denmark and Norway, are made available only by a request for particular records. This is a serious limitation because it puts the onus on the public to identify and request them. In other ways, however, the Act is more liberal than the laws in Denmark and Norway.

The adoption of the Freedom of Information Act has brought about a radical change in the public's right of access, and in the attitudes and practices of officials. This is no doubt partly due to the public's vigorous enforcement of the Act in the courts, which have spelled out in greater detail the types of documents which may legitimately be withheld under the nine exemptions. However, certain

difficulties arose in applying the Act, especially in interpreting the meaning of some of the exemptions, and in requiring all departments and agencies to comply with the Act. For this reason it was amended in 1974, with the amendments becoming effective in February 1975. In 1974 Congress also passed a related Privacy Act. This act allows citizens to see any personal files being held on them in government agencies, subject to certain exemptions.

2. The 1974 Amendments and the Privacy Act[13]

The new provisions put into the Freedom of Information Act in 1974 make it much easier for citizens to enforce their rights. Thus the onus has been put firmly on government agencies to prove why they should not release requested documents, instead of the citizen having to prove why he should have them. Also, administrative officials are now instructed to reply to a request for a document within ten working days, and to an appeal to a higher authority in the department within a further twenty working days, though for special reasons they can get an extension to a total of forty days. They are also required to release all non-secret information that is segregable, even in a

13 The following account of experience with the revised Freedom of Information Act and the related Privacy Act is based mainly on my recent article, "Freedom of Information: the American Experience", Canadian Forum (September 1978), 10-13, which in turn was based on a visit to Washington in August 1977 to study the situation at first hand.

secret file. This has necessitated what officials refer to as a "paragraph-by-paragraph" review of documents, and may result in a requester obtaining a document with certain names or material blanked out.

Moreover, the language of some of the exemptions has been tightened up so that officials can no longer hide matters so easily under them. The actual wording of the nine exemptions as amended in 1974 (with the amendments shown by underlining) is as follows: the right of access does not apply to matters that are

> (1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defence or foreign policy, and (B) are in fact properly classified pursuant to such Executive order;
>
> (2) related solely to the internal personnel rules and practices of an agency;
>
> (3) specifically exempted from disclosure by statute (amended in 1976 to add: ...provided that such statute (A) requires that the information be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of information to be withheld);
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy,

(D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

It will be noted that the most important areas of exemption are the same as those in the Scandinavian laws.

Under the addition to the first exemption, a judge can now examine even classified documents to see if they were properly classified or whether excised parts were legitimately blanked out to protect national security or individuals. A department's fear that a decision to withhold information will be overturned by the courts is a very sobering corrective to over-secretiveness. If a citizen appeals to the courts and wins his case, the judge can now order the government to pay all of the court costs. A number of citizen protective groups and legal firms have sprung up in Washington which take on cases for citizens, pay the costs if he loses, and collect costs at the full legal rate if he wins. Under the amended Act a citizen is no longer required to request a specific document. Since he may only suspect the existence of a document that ought to be revealed and cannot request it specifically, it is now sufficient to "reasonably describe" the documents he wants, and he can request all documents on a

specified matter. Also, he can inspect these documents and only has to pay for the ones of which he wants photocopies, usually at the rate of ten cents per page, plus a search fee of $7.50 per hour if this is necessary. The fee is waived by some agencies, especially in the case of indigents or if the request is for information to be released in the public interest rather than for personal reasons. Thus the Central Intelligence Agency has waived most of its search fees, while the Federal Bureau of Investigation has not.

The revised Act also provides for disciplinary action against officials who wrongfully refuse to release documents, permits officials to release exempted ones, and requires the departments and agencies to submit annual reports to Congress. These reports give such information as the cost of handling requests for documents, the names of the officials who have refused requests, the number they have refused, and the number of appeals against refusals.

Under the more liberal guidelines of the 1974 amendments, requesters have flooded the federal courts with appeals, where many cases are pending, but where they get priority over other cases. From the cases already decided under the new guidelines, it is clear that the courts will be much less favourable to the administration than they were before 1974. Until now they have usually accepted a department's affidavit stating the reasons why a matter must be kept classified, but the courts may now start using their new power to look at a classified document to see if all or part of it can be ordered to be

released. There are also other problems of interpretation still to be solved, notably regarding the meaning of "reasonably described" records and of "internal agency memoranda". A more precise meaning for many of the provisions, especially the new amendments, still remains to be spelled out by the courts.

The Privacy Act opened up another large category of government files when it came into effect in September 1975. Under it citizens now have the right, as in Canada under the Human Rights Act of 1977, to ask if a federal file is being held on them. If so, they can inspect it and, if it contains wrong information, require its correction. The Act is an omnibus measure regulating the acquisition, storage, retention and dissemination of personal files held by federal agencies. It gives individuals an enforceable right to demand correction of files which are not accurate, relevant, timely and complete. Also, agencies may only disclose files where authorized by statute, or with the permission of the individual affected. And they must publish annually a description of their personal records systems, the categories of individuals and kinds of data covered by each system, the uses to which the information is put, and the agency policy regarding storage and disposal. An agency official may be fined up to $5,000 for wilfully breaching some of the Act's requirements, and an agency is liable for civil damages of not less than $1,000 if an individual is adversely affected by the agency's failure to comply with the Act.

Many citizens make a request for their file under both Acts in the same letter. There are advantages in doing this because, though the Privacy Act has fewer secrecy exemptions than the Freedom of Information Act, and allows private access to the file, the Central Intelligence Agency and law enforcement agencies like the Federal Bureau of Investigation are completely exempt from the Privacy Act, and it does not include the instruction for a reply within ten working days.

3. Recent Experience

In 1976, the first full year after both the 1974 amendments and the Privacy Act went into effect, the federal departments and agencies received a tremendously increased number of formal requests for access to official documents, the total estimated to be about 150,000. These requests were not only from private citizens, but also from the press, organizations and business firms. Some agencies, like the FBI and the CIA, received thousands of requests from individuals wanting to know whether these agencies kept a file on them and if so, what was in it. Before the end of the year, such agencies had a huge backlog of unprocessed requests, and by the summer of 1977 the FBI had to bring in 400 of its regular operatives from the field to handle them. That so many requests have been received is hardly surprising in the light of the American public's loss of faith in its federal government during the Nixon years.

Many startling cases have been brought to light since the teeth were put into the Information Act in 1974. One of the most shocking was the disclosure in 1977 of CIA files on what is called the MK-ULTRA case. It has been revealed that for twenty-five years the CIA was masterminding experiments on human guinea-pigs designed to control their minds with powerful drugs. One of the subjects later committed suicide, and some subjects were chosen because they were dying. Other examples are the revelation of CIA files on the planned assassination of foreign leaders and on the training of local policemen as burglars. Requests under the Information Act have also shed new light on subjects as diverse as the mysterious Glomar Explorer, the Pentagon Papers, and the espionage conviction of Julius and Ethel Rosenberg.

The reports to Congress required by the 1974 amendments reveal some interesting statistics. Congress did not require the total number of requests to be recorded, so the total for the whole administration has to be estimated from the agencies that did report this. Thus it has been calculated that in 1976 there were about 150,000 requests under both the Information and Privacy Acts, of which about 25,000 or 17% were denied in whole or in part. About 4,200 of these denials, or again about 17%, produced appeals to the head of the organization. In over half of these cases, the head changed the original decision and released part of the information requested (46%) or all of it (12%). The result is that only about 15% of the documents requested were wholly denied by the departments and agencies on the ground that they fell under one of the secrecy provisions of the Act. Mainly

responsible for these denials were the security and law enforcement agencies, which still deny large numbers of requests for personal documents.

4. Problems of Compliance

Because of the large number of requests under both Acts, compliance has of course produced problems for the administration, especially the welfare, defence, treasury, security and law enforcement agencies, which receive the bulk of the requests. Thus the Justice Department claims that, including the FBI, the amount of time it devoted to freedom of information and related privacy requests rose from 120,000 man-hours in 1975 to more than 600,000 in 1976, and has protested that the increased workload and the potential revelation of secret information weakens its law enforcement capacity.

Some agencies do not produce replies within the Information Act's specified time schedule, which they argue is unrealistic in the case of classified and personal records requiring a line-by-line review. For instance, both the FBI and the Justice Department, to which the FBI appeals go, are running about six to eight months behind the schedule. A ruling in 1977 by the courts that the Act's time constraints are "not mandatory but directive" has certainly not helped to speed up compliance.

Most departments and agencies, however, have managed to stick to the schedule. Surprisingly, the Defence Department, which receives nearly a third of all requests, was able to process nearly 44,000 in 1976 and to wind up with very little backlog. As one official of that department's freedom of information program told me: "A reason for this is that the armed forces are used to taking orders and following the letter of the law. Also, successive secretaries of defence have stressed their desire to release all possible information, and we have a very efficient system of records management and retrieval." He stressed that a serious problem for gigantic departments in meeting requests, and on time, was simply finding the information requested.

Often departments without an efficient listing and indexing system cannot find the requested documents. Nor can the requester find out which documents he wants to request. This explains a number of the costly "fishing expeditions" by the press and other organizations, in which a whole group of documents has to be requested in order to get the one or two pieces of information wanted.

Another difficulty for the departments and agencies in complying with the Acts is the cost. The total cost for 1976 of handling requests under both Acts was nearly $20 million. Of this, about $5.3 million was spent by the Department of Health, Education and Welfare, $4.7 million by the Defence Department and $4.5 million by the Treasury Department. But when these figures are compared with the total budgets of these departments, they turn out to be a miniscule share, far less

than 1%. They must be weighed against the public interest to be served by releasing information and enforcing the public's right to know.

Another problem is that the Information Act is being used for purposes not intended by Congress. It was expected by the Act's proponents that it would be mainly of use to the press in digging embarrassing information out of a reluctant government. Instead, it has been mainly used by individuals, scholars and business firms. No one imagined the large number of individual requests that would come pouring in. This was mainly due to the loss of faith in government during the Nixon years, stimulated by a number of citizen-aid organizations and "storefront" legal firms that have sprung up. Two of the most important of these are the Freedom of Information Clearinghouse and the Project on National Security and Civil Liberties. Both of them distribute pamphlets to the public explaining the Act, urging people to make use of it, and even providing model request letters to government agencies. The second organization is headed by Morton J. Halperin, a former deputy assistant secretary of the Department of Defence, and has successfully appealed to the courts some of the most important cases in recent years.

It was not anticipated that business corporations would make so much use of the Act. They have used it not only to get general information from the government that would be of value to them, but to get information on their competitors. New business and law firms have

sprung up which specialize in this activity, and which carry appeals to the courts. Now the competitors are fighting back with what are called "reverse freedom of information cases", in which they seek a court injunction forbidding the government to release requested documents, and the government is having greater difficulty in collecting sensitive information from business corporations.

The 1974 amendments were vetoed by President Ford and became law only because they were repassed in Congress by the necessary majority of two-thirds under the constitution. But the Carter administration seems inclined to support the broadening of the Act. In May of 1977, Attorney General Griffin Bell issued new guidelines requiring agencies to release documents, even if they fell under one of the nine exemptions, when this would not be "demonstrably harmful" to the government or any individuals involved. He also warned that in future the Justice Department might decide not to defend an agency in court for refusal to release documents if the Department regarded them as harmless. Until then, it had almost automatically defended all such refusals.

The general opinion in the United States is that the Freedom of Information Act as amended in 1974 and supplemented by the Privacy Act has been highly successful in meeting its objectives. Doubtless the main problems that its enforcement has created will be solved by the passage of time and by further minor amendments to refine the law. Many people regard the current overload difficulties as temporary, due

to a large backlog of cases suddenly coming forward after 1974 and to the unpreparedness of the agencies for this. They predict that as American citizens gradually regain confidence in their government, the total number of requests and the difficulties and costs of compliance will gradually decline in future years.

Clearly, the establishment and enforcement of the principle of public access through a strong Freedom of Information Act has not, as opponents feared, seriously slowed the wheels of government administration. Indeed, it appears to have been well-accepted by most administrators, who are attempting to implement it in good faith. Many of them even admit that its effect on the administration has been salutary, and results in the preparation of better documents and reports. As Professor Anderson notes, open records laws exert "a pervasive preventive effect by virtue of the sobering influence of prospective public scrutiny".[14]

5. Other Federal Acts Favouring Openness

The movement of public opinion that sired the Freedom of Information and Privacy Acts also fostered provisions in three related federal

14 See Anderson, op. cit., supra., note 9 at 447.

laws designed to promote openness.[15] One of these is the Federal Advisory Committee Act, passed in 1972, which covers some 1250 advisory committees whose membership includes persons who are not government employees. These committees are now required to open their meetings to the public, except when discussing matters similar to the exemptions under the Freedom of Information Act. Also, they must keep minutes of their meetings, and citizens have a right to challenge both the closure of a meeting and the non-disclosure of minutes.

A more recent law is the Government in the Sunshine Act, which was passed in 1976 and became effective in March 1977. This Act which applies to the federal regulatory agencies and other statutory authorities, requires meetings of their governing body to be open to the public, with exceptions similar to those under the Advisory Committee Act. Also, transcripts or recordings must be kept of closed meetings, and a citizen may challenge an agency for closing meetings or not disclosing transcripts.

The third law, of special interest because it deals with a state and local matter, is the Family Educational Rights and Privacy Act of 1974. This Act requires schools receiving federal funds to permit students either over 18 or attending a tertiary institution, and the parents of

15 See J. McMillan, "Making Government Accountable - A Comparative Analysis of Freedom of Information Statutes", New Zealand Law Journal (1977), 248, 275, 286 at 287.

younger students, to inspect records intended for school use or made available to parties outside the school. The Act also contains rights to correct inaccurate or misleading records and to restrain the disclosure of personally identifiable records.

6. State Laws on Openness and Personal Privacy

Many American states had passed public access laws even before the federal Act of 1966. In fact, Louisiana had adopted a strong law as early as 1912.[16] Many had also passed "open-meeting" laws, which grant the public a legal right to attend meetings of state, county and local government bodies. Indeed, by 1965 twenty-six states had such laws. This was in sharp contrast with the situation in Canada where a survey conducted by the Canadian Press at that time found that at the municipal level there was much secrecy and many closed meetings of councils, boards and commissions.[17] After making a detailed study of the new state open-meeting legislation in the U.S., the Harvard Law Review concluded that it

> "has neither revolutionized the conduct of state and local government nor brought it grinding to a halt...the presence of an audience has not in most cases restrained officials from giving full expression to their views, the problems

16 Anderson, op. cit., supra, note 9, 445.

17 "Press Secrecy in Municipal Government", Press Journal v. 7 (Nov. - Dec. 1963), 8-16.

> concededly created by an irresponsible press have not been intensified...and the fear that officials would waste their time making speeches has proved largely unfounded." [18]

Since 1965, the passage of the federal access Act in 1966, and especially its amendment in 1974 and the related federal laws since then, have given a strong push to the movement for state laws on greater openness and access to state records and personal files. Also, the Freedom of Information Clearinghouse in Washington has produced a model state freedom of information statute, which many states are using as a basis for either amending their existing law on access or adopting a new law. A study conducted for the Michigan Law Review gives a comprehensive survey and valuable analysis of the state laws on openness as they existed early in 1975.[19] Since then, however, many state laws have been revised and new ones passed.

A survey made in 1977 (by Plus Publications, Inc.) shows how much progress has been made by the states in passing such laws. By 1977 forty-eight states had enacted state-wide public access laws. Mississippi and Rhode Island were the only ones that had not done so. Moreover, with the passage of open-meeting laws in New York and Rhode

18 "The Press Fights for the 'Right to Know'", Harvard Law Review 75 (1962), 1219.

19 "Project: Government Information and the Rights of Citizens", Michigan Law Review 73, 6 and 7 (May-June 1975), pp. 1163-1340. Most of the state laws as they existed at the end of 1976 may be found in: Library of Congress, Congressional Research Service, Compilation of Selected Federal and State Freedom of Information and Privacy Laws, prepared by Paul S. Wallace, Jr., March 16, 1977.

Island in 1976, all fifty states and the District of Columbia now have some form of open-meeting law.

Laws to protect privacy have developed at a slower rate in the states than has legislation on openness. It is true that some state laws prohibiting the interception of oral communications and protecting the confidentiality of professional communications are several decades old. However, few states have as yet adopted "fair information" laws, comparable to the federal Privacy Act, to regulate the information and record-keeping practices of state administrations. Such laws have all been enacted since 1973, and by 1977 had been adopted in only nine states: Arkansas, Connecticut, Massachusetts, Minnesota, New Hampshire, North Carolina, Ohio, Utah and Virginia. A tenth state, California, had adopted many of the same protections under an executive order.

The states have been even slower to extend privacy protections to the private sector, while waiting for the report of the Federal Privacy Protection Study Commission, which was appointed in 1974 under the Privacy Act. However, by 1977 two states, California and Maine, had passed laws guaranteeing employees in the private sector access to their personal files. Also, more than half of the states (26) had shield laws that permit reporters to refuse to identify their sources of information. Some states also protect the confidentiality of the information reporters receive from confidential sources. Even where statutory protection is not available, however, reporters have traditionally enjoyed considerable protection by the courts.

Other aspects of personal privacy that were protected in state laws by 1977 were: restricting access to medical or hospital records (31 states); permitting a person to appeal for expungement of arrest records (18 states); prohibiting an employer from requiring a lie-detector test (18 states); regulating law-enforcement records systems (7 states); and restricting third-party access to an individual's financial records held by financial institutions (California and Maryland). A few states also restrict access to motor vehicle registration lists, or prohibit the denial of state services to persons withholding their social security number.

In sum, this information reveals that the American states have now accepted the view that access and open-meeting laws are needed as much at the state as at the federal level. Also, a majority of them now have shield laws for reporters, and gradual progress is being made toward adopting laws designed to provide access to personal files and to protect the various other aspects of personal privacy.

CHAPTER II

DEVELOPMENTS ELSEWHERE

A. Europe

Aside from Scandinavia, in four other countries of Western Europe significant developments have occurred in the direction of providing a public right of access to administrative records. Austria adopted limited provisions for public access in 1973, France passed an access law in July 1978, and in the Netherlands a similar law is before the legislature and expected to be approved by the upper House in November 1978. In the United Kingdom, though there have been steps toward greater openness, an access law has not yet been adopted.

1. Austria

In 1973 the Austrian Federal Parliament provided a limited right to administrative information by inserting two clauses in the Federal Ministries Act that gave ministries a "duty to inform".[1] One clause

1 See L. Adamovich, "The Duty to Inform in Austria as a Means of Realizing Freedom of Information", in Proceedings of the Colloquy of the Council of Europe on Freedom of Information and the Duty for the Public Authorities to Make Available Information (Strasbourg: Council of Europe, 1977), pp. 27-37.

requires each federal ministry to provide information to the public on request, and the other requires each federal minister to ensure that the subordinate authorities under his jurisdiction do likewise. However, this duty to furnish information is subject to the constitutional obligation of civil servants to observe official secrecy. The Austrian constitution provides that, unless otherwise provided by law, all federal, provincial or local functionaries are pledged to secrecy if it is in the interests of an administrative authority or the parties concerned. No legislation has qualified this obligation, so it is necessary to interpret the meaning of "interests of an administrative authority" and "interests of the parties concerned".

In recent years it has been argued that the two phrases should be given a restricted interpretation, partly because Article 10 of the European Convention on Human Rights (which in Austria enjoys the status of a constitutional instrument) calls for freedom of information, and partly because otherwise the two clauses in the Federal Ministries Act would have little meaning. The Austrian government has to some extent adopted this view and has therefore approved a set of guidelines to implement the Act.

These guidelines, however, are rather restrictive. They provide, for instance, that there is no duty to allow inspection of documents, but only to communicate the contents of documents. The obligation to furnish information only applies where the decision-making process has

terminated and has led to a tangible result. Requests do not have to be met which require the evaluation of voluminous materials or the preparation of detailed papers; and an inquiry must be directed towards a specific matter.

On the other hand, a refusal to provide information can be appealed to the administrative courts. This means that the public's right can be enforced and may be enlarged through judicial interpretation.

In summary, then, Austria has now moved from a country where discretionary secrecy was the rule to one which now provides a limited right to administrative information.

2. France

Before 1978 France had the traditional system of discretionary secrecy but, as in other countries, this was combined with a number of provisions for administrative openness. For instance, municipal council meetings must be open, and new town plans have to be considered at a public inquiry. Also, individuals have access to the registers of births and deaths, and they have broad rights of access to official documents in their own case, in both the ordinary and administrative courts. In recent years, however, there has been an insistent demand in responsible quarters for greater openness and a general right of public access in statutory form.

This demand gained force in 1973 when a Commission for the Coordination of Administrative Documentation submitted a report to the Prime Minister which concluded by proposing:

> "the institution of a genuine right to communication for members of the public. The right's fundamental principles should be laid down by the legislature, for only intervention by the latter could make the impact necessary for the reversal of the most deeply-rooted administrative habits. The promulgation of an act on the right to information would be in keeping with a process already initiated by many liberal countries." [2]

Following this proposal, the Prime Minister established a working party which in 1976 submitted a bill and a draft decree. In 1976, too, the government announced that it would introduce privacy legislation to grant individuals a right of access to their personal files, to have them notified when information about them had been gathered, and to establish a national commission to control computer data banks.[3] This legislation was passed on January 1978 (no. 78-17).

In February 1977 the government issued a decree establishing a commission charged with favourimg the communication to the public of documents created by or for the administrative organs of the state. This commission, chaired by a member of the Council of State, was empowered to determine by regulations the documents to be released

2 Quoted in L. Fougere, "Freedom of Information and Communication to Persons of Public Documents in French Theory and Practice -- Present Situation and Plans for Reform", in Proceedings of the Colloquy, op. cit., supra, note 1 at 52.

3 McMillan, op. cit., ante, p. 46, note 15 at 227.

on request, to advise the ministers and prefects (provincial governors) on any question relative to the application of the decree, and to make proposals on the revision of the laws and regulations related to the release of administrative documents. It was thus an unusual combination of an executive body with powers to require greater openness and a study commission that could propose amendments to the laws, and could indeed propose a law on public access if it so chose. But the membership, consisting mainly of officials plus some members of Parliament, was rather conservative and seemed likely to favour a gradual approach toward changing the attitudes and practices of public servants rather than a dramatic reform through legislation.

To the surprise of the commission, on July 17, 1978, the French Parliament passed a law (No. 78-753) which contained provisions inspired by the American Freedom of Information Act, and which established a new commission to enforce the law, the Commission on Access to Administrative Documents. However, the decree needed to put the law into effect had not been issued by October 1978.

This law will give a much firmer foundation to the principle of public access than the decree and commission which preceded it. Like the American Act, it declares and guarantees a right to administrative documents, including documents in one's own case, subject to a list of exemptions, and it applies to all emanations of the state, including territorial collectivities. The provisions requiring a reply to a request are rather strong, and there is provision for

appeal to the independent administrative court system. However, the exemptions are very broad, thus giving considerable room for official discretion, and the lists of specific documents which must be kept secret are to be laid down in ministerial regulations (though these are to be framed after receiving the advice of the new commission). The new commission is charged with supervising the implementation of the law. Somewhat like an ombudsman, when appealed to by a person who has had difficulty in obtaining the release of a document, it is to give its opinion to the competent authority. Also, it is to advise the authorities on the application of the law, and may propose suitable amendments to the laws and regulations.

Considering the traditional secrecy of French officials, this new law seems to be a giant step forward. But the extent to which it and the new commission will succeed in altering existing official attitudes and practices remains to be seen.

3. Netherlands

Like France, the Netherlands has had a system of discretionary secrecy combined with specific provisions for openness and access. In recent years, however, there has been a strong demand for a law providing for a general right of public access to documents.

This demand took official form in 1970 with the publication by a

commission on governmental openness of a report which recommended a law on access to administrative information, and which contained a draft bill. After considerable public discussion, the government introduced its own draft bill on the subject in 1975. This bill was considered by the lower House of Parliament and, after a committee received the views of various organizations, was so heavily amended by the committee and the House that the government produced two new drafts. The lower House approved a final version in February 1977, but because of the fall of the government in that year, approval of the bill by the upper House was delayed. However, it is expected to be approved in November 1978, as the Openness of Administration Act, and, after regulations under the Act have been approved, to go into operation in mid-1979.

While much like other access laws, an unusual feature of this Act is that it provides a right to information in administrative documents rather than to the documents themselves. This, unfortunately, provides an opportunity for officials to interpret the contents of documents to suit their own interests, rather than permitting direct access to the actual documents. Also, the secrecy exemptions in the Act are very broad. Two of them are introduced by the word "might", and are so broad that the government or officials could include under them almost any information that they wished. Thus, information "shall not be divulged if it might (a) endanger the unity of the Crown or (b) damage the security of the State". Because of this and other provisions, Dutch legal scholars have complained that the Act is too weak to

improve existing public access and is really a secrecy Act. One scholar has called it "whipped air and cheese, with big holes".[4]

The Act does have some strong aspects, however. For instance, it requires the publication of many types of policy documents, and its scope extends to provincial and local governments. More important, there is provision for appeal to the Supreme Administrative Court. This Court was created as a strong, independent arm of the Council of State in 1976, and from its inception has been headed by a judge who is likely to give a liberal interpretation to the Act. The broadness of the exemptions not only gives officials and ministers greater discretion, but also gives the Court greater scope for developing either a restrictive or liberal interpretation of the Act. Hence the Act's success will largely depend on the independence and views of this new appeal body, which has the power to make final decisions and to order the production of documents.

An interesting provision in the Act -- and an unusual one even for the Netherlands -- is that the government must periodically report to Parliament on the Act's operation. After three years, and every five years thereafter, the Ministers of General Affairs and the Interior must prepare a report which incorporates the findings of government

4 Quoted in a recent letter to the author from Dr. Leo Klinkers, who wrote a dissertation on public access in the Netherlands.

bodies, scholars, and representatives of the media and public service organizations on the implementation of the Act.

4. The United Kingdom

In recent years there has been much concern about excessive governmental secrecy in the United Kingdom, and some significant moves have occurred in the direction of greater openness. For instance, in 1958 the Tribunals and Enquiries Act required that reasons for decisions must be given by a tribunal, and by a minister in a statutory inquiry. In 1967 the office of Parliamentary Commissioner (ombudsman) was created and given the power of access to documents on behalf of complainants. Senior officials are now freer to discuss policy matters publicly, particularly before parliamentary committees. The government has instituted the device of issuing Green Papers, which make and discuss alternative proposals on policy issues in order to stimulate public reaction to such proposals. In 1968 the government reduced the archival period for the release of historical records from fifty to thirty years, and in 1976 announced that some categories would be released after fifteen years. Also, Cabinet policy documents are to be prepared in such a way that the supporting factual material can be released. There have also been several important official inquiries into the Official Secrets Act and related matters, such as the "D" (or Defence) Notice System (under which notices are issued to the press advising them not to publish

anything on a particular security matter covered by a notice).

The first official challenge to the traditional system of discretionary secrecy came in 1968 with the publication of the report of the Fulton Committee on the Civil Service (Cmnd. 3638). This report stated that the public interest would be better served by greater openness and proposed that the government set up an inquiry to make recommendations for getting rid of official secrecy. Instead, the government appointed the Franks Committee, whose terms of reference were restricted to studying the Official Secrets Act, and in particular the wide scope of section 2, which creates various criminal offences for the unauthorized communication or receipt of official information. The Committee's report in 1972 (Cmnd. 5104) proposed an Official Information Act which would restrict penal sanctions for disclosures to a list of categories similar to the exemptions found in an access law, but it did not propose reversing the principle of discretionary secrecy by means of such a law. In November 1976 the Home Secretary announced that the government was prepared to accept most of the Franks Committee's proposals, and even to exclude some additional matters from the list of disclosures involving criminal sanctions, such as Cabinet documents not dealing with national security. In July 1978 the government outlined its detailed proposals in a White Paper, Reform of Section 2 of the Official Secrets Act 1911 (Cmnd. 7285).

Both the Franks report and the White Paper have been criticized for

making the penalties for disclosing secret information more precise without at the same time balancing them with provisions for a right of public access to non-secret information.[5] Public pressure therefore continues for a law on public access. In 1976, a group of MPs formed an All Party Parliamentary Committee for Freedom of Information and announced plans to introduce a draft freedom of information bill. Supporters have organized a public arm of this Committee, called the Freedom of Information Campaign, which has representatives from professional, trade union and community groups, and which is actively mobilizing public support. In 1978 the British section of the International Commission of Jurists, called Justice, issued a report, Freedom of Information, which favoured greater openness but proposed, rather than a right of access by law, the adoption of a code of practice by the government, with complaints going to the Parliamentary Commissioner. This, of course, would still leave the final decision on the release of information to the ministers. An influential private organization for research on policy issues, the Outer Circle Policy Unit, in 1977 issued a brief report, An Official Information Act, which favoured a right of public access, and, following a conference on the subject in June 1978, the Unit published an annotated Official Information Bill. It contains the

5 See W. Birtles, "Big Brother Knows Best: The Franks Report on Section Two of the Official Secrets Act", Public Law 100 (1973); and J. Jacob, "Some Reflections on Governmental Secrecy", Public Law 25 (1975).

essential features of the American law except that it provides for an appeal to the Parliamentary Commissioner instead of to the courts, and the commentary is very critical of the White Paper for not proposing such a law. Moreover, the Labour party's national executive has a committee working on a draft of an access act. To date, however, the British government has refused to accept the argument that legislation is needed to declare and establish a general right of public access to official documents.

B. Australia

Australia, like Canada, has inherited the tradition of discretionary secrecy, with laws and regulations slanted against the free release of information. For instance, the Australian Commonwealth's Public Service Act and Crimes Act prohibit the unauthorized disclosure of any administrative documents. Thus according to law, subordinate officials must have authority to release documents. Their natural reaction to a request for a document or information is therefore one of caution and timidity, as in Canada. In a recent article, an Australian legal scholar, John McMillan, gives many examples of the unnecessary withholding of information by Australian federal officials.[6]

6 John McMillan, "Freedom of Information in Australia: Issue Closed", Federal Law Review 8 (1977), pp. 379-434. In this article he also gives a detailed criticism of the proposals made by a committee of federal officials in 1974, which are discussed below. See also his comparative article, op. cit., supra, note 3.

1. Greater Openness

The election of a Labour government in 1972, however, began a trend toward greater governmental openness in Australia. The new government created a Department of Media, and set up information and advice centres. It also instituted a Digest containing ministerial statements, etc., and the device of issuing Green Papers to inform the public on policy issues. In addition, it set up advisory committees with a broad community membership, and made greater use of committees of inquiry. More important, it appointed an interdepartmental committee of officials to study the problems of freedom of information, and the committee's report in 1974 favoured a freedom of information law similar to that in the United States.[7]

With Labour's loss of power, some of the initiatives toward greater openness were abandoned. The new government did, however, follow the lead of most of the Australian states by creating the office of Parliamentary Ombudsman in 1976. It also continued the previous government's interest in freedom of information legislation, and reappointed the interdepartmental committee to reconsider its earlier

7 Attorney-General's Department, Report of Interdepartmental Committee, Proposed Freedom of Information Legislation (Canberra: Australian Government Publishing Service, 1974).

report. As a result, the committee issued a second report in 1976.[8] As might be expected from a committee of officials, the proposals made in its reports were for a rather weak access law, though as a result of public discussion and criticism the proposals made in the second report were somewhat stronger. These proposals then became the basis for a bill introduced by the Commonwealth Government in June 1978, the Freedom of Information Bill 1978. The government also introduced a related bill, the Archives Bill 1978, which limits the withholding of most secret documents to thirty years.

Meanwhile, the Royal Commission on Australian Government Administration had commissioned a study on access to documents, and this was published as an appendix to the Commission's report in 1976, the same year as the second report of the interdepartmental committee. The appendix was in the form of a minority report from Commissioner Paul Munro, and presented a well-argued justification for a much stronger law. It also contained a draft bill modelled closely on the U.S. Freedom of Information Act, but with adjustments to suit a parliamentary system, and included a lengthy explanation and justification for each of the bill's provisions, prepared by

8 Attorney-General's Department, Report of Interdepartmental Committee, Policy Proposals for Freedom of Information Legislation (Canberra: Australian Government Publishing Service, 1974).

John McMillan.[9]

As in Canada and the United Kingdom, the supporters of a strong law have formed a lobbying organization, the Freedom of Information Legislation Campaign Committee, which has representatives from many important interest groups. It is pressing for a strengthening of the Freedom of Information Bill 1978, now that the bill has been referred to a committee of Parliament for study and amendment. However, far-reaching amendments are not likely to be accepted by the government.

2. The Freedom of Information Bill 1978

The 1978 Bill contains two features which may be regarded as improvements over the American legislation. The first is the more restrictive wording of some of the exemptions. For instance, the

9 Royal Commission on Australian Government Administration, Minority Report, Appendix 2.A., volume 2 (Canberra: Australian Government Publishing Service, 1976). An important argument contained in the minority report, and illustrated in its draft bill, is that any broad secrecy exemption based on a few general words, such as "foreign relations" or "law enforcement" will necessarily cover a large number of documents that need not be secret and ought to be released. Any such exemption should therefore be qualified by a statement of the types of documents that it does not cover, as was done in the American Freedom of Information Act by the amendment of exemption numbers 1 and 7 in 1974, and 3 in 1976 (see pages 35-36, where the amendments are underlined). Also, officials ought to be given the permissive power to release documents, even if they seem to be covered by a broad exemption, when this clearly does no harm to a public or private interest.

first one exempts documents if their disclosure "would" (rather than "might") prejudice the security, defence or international relations of the Australian Commonwealth or its relations with any of its states. Others exempt documents only if their disclosure "would be reasonably likely to have a substantial adverse effect" or some similar wording. The second feature is that provision is made for final appeal to Australia's Administrative Appeals Tribunal, which was created in 1975, rather than to the ordinary courts. This will have the advantages of greater speed, less cost and more expertise on administrative matters.

Despite these advantages, critics of the Bill claim that other weak features, taken together, virtually emasculate it. Thus the Freedom of Information Legislation Campaign Committee has issued a "Briefing Kit" which lists ten major faults of the Bill and explains several additional shortcomings, including some important omissions, in a clause-by-clause annotation of the Bill. It lists the ten major faults as follows:

1) Subject to two narrow exceptions, the Bill will only apply to documents created after the Bill commences operation.

2) Most documents initially withheld can remain secret for thirty years.

3) If a minister thinks that disclosure of a document could prejudice national security, defence, international relations, federal/state relations, or could reveal confidential information received from another government, the minister can conclusively stamp the document secret. No appeal to the Administrative Appeals Tribunal can be made against the minister's decision.

4) The Governor-General can make a regulation exempting any statutory authority or any class of documents from the operation of the Bill.

5) No citizen will be able to afford "freedom of information". Search and inspection fees can be charged, and there is no provision for these to be waived when information is sought for a public interest purpose. Moreover, if a citizen appeals a denial of information to the Administrative Appeals Tribunal the citizen bears his or her own legal costs, even if the appeal is successful.

6) Most of the exemptions from disclosure contained in the Bill are so broad as to encompass a vast range of innocuous information. For instance, exemptions protect any documents containing opinions, advice or recommendations made during policy formulation; or information whose disclosure would adversely affect "a financial, property or staff management interest of the Commonwealth" or "the efficient and economical conduct of the affairs of an agency".

7) The Bill is littered with procedural barriers (agencies can procrastinate for two months before answering a request) and discretionary roadblocks (disclosure of non-exempt documents can be deferred "in the public interest", or requests defined by reference to the subject-matter of documents can be refused if to answer them "would interfere unreasonably with the operations of an agency").

8) There is no requirement that indexes of major types of documents be prepared (such as committee reports, consultants submissions, or consumer tests).

9) The Bill does not reform the security classification system, which permits any bureaucrat with a "Secrecy" stamp to enshrine any document in perpetual darkness, however innocuous the document or misconceived or myopic the classification.

10) The Bill limits the authority to disclose to a small number of senior officers; others cannot disclose even non-exempt documents, and could face two years' gaol under the Crimes Act if they do so. 10

10 As published in Rupert Newsletter 14-16 (April - August 1978), pp 4-5.

Regarding the nature of the Bill's major faults, the Committee states:

> "While Australia has a different system of government to that in the U.S., or Sweden, none of the major faults in the Bill have anything to do with protecting the special interests that might arguably need safeguarding in Australia (such as Cabinet solidarity, ministerial authority, and public service impartiality). All of the major faults (and most of the equally grave ones outlined in the attached annotation) are simply the harvest of Public Service timidity and conservatism." [11]

3. The Australian States

As might be expected, the state governments have also been moving towards greater administrative openness. For instance, since 1971 all of them except Tasmania have established a Parliamentary Ombudsman. Western Australia established the office in 1971, South Australia in 1972, Victoria in 1973, and Queensland and New South Wales in 1974. Moreover, the proposal for a federal law on access, as in Canada, has stimulated similar proposals at the state level.

In October 1977 the Attorney-General for South Australia, Mr. Duncan, told a public meeting organized by the Freedom of Information Lobby that his state government was in favour of legislation on the subject, but was waiting for the federal government to produce its legislation

11 Ibid., p. 4.

since his government believed that it would be desirable to have uniform legislation throughout Australia. However, he felt that the Act proposed by the federal interdepartmental committee was too weak. "It would seem that such an Act will go further towards entrenching the administration's right to withhold information than guaranteeing the public's right of access to it," he said, since it would permit a minister to be judge in his own case and stated only what could be withheld and not what should be released.[12]

Mr. Duncan did not say why his government believed that there should be uniform federal and state legislation. One of the advantages of a federal system is that there can be experimentation with different forms of new laws or institutions among the states or provinces to see which is best. Also, a radical new law or institution can be more safely tried out in a single province or state. Thus the ombudsman institution was introduced first at the lower level in both Australia and Canada.

More recently, the Premier's Department in New South Wales has established an internal committee on freedom of information and privacy, and in Victoria the opposition Labour party is working on a freedom of information bill which it hopes to introduce soon. The original draft was prepared by John McMillan, and is similar to the

12 Story in Advertiser, November 1, 1977.

one published by the Royal Commission on Australian Government Administration.

There has also been an official proposal for a public access law in New South Wales. A commission appointed to review the state's administration issued an interim report in November 1977 which made a strong case for such a law.[13] It proposed that, as the next step, it should prepare a draft Green Paper on public access to state files, incorporating a draft bill, as a basis for public discussion.

The interim report also contained an account of separate surveys of public and civil service attitudes that the commission had conducted, with some interesting comparative results (p. 290). Respondents were asked to what extent they believed members of the public should have access to state government files that (a) may be kept concerning them, and (b) affect the community generally. In reply, 75% of the public survey thought that members of the public definitely should have access to their personal files or that an independent organization should decide. Only 48% of the public servants surveyed thought this. In the public survey, only 9% thought the government organization concerned should decide, while in the civil service survey, 29%

13 Review of New South Wales Government Administration (Peter Wilenski, Commissioner), Interim Report: Directions for Change (Sydney: N.S.W. Government Printer, 1977), Chapter 21.

thought this. The difference between public and civil service attitudes was similar, though not as striking, for public access to files that affect the community generally. In the public survey, 65% thought members of the public either definitely should have access to such files or an independent organization should decide, while only 48% of the civil servants thought this (the same percentage as for personal files). Only 18% of the public thought the government organization concerned should decide, while 30% of the civil servants thought this. It is likely that there would be a similar difference between public and civil service attitudes in other jurisdictions, including Ontario.

CHAPTER III

RECENT DEVELOPMENTS IN CANADA

A. The Federal Government[1]

1. Main Provisions for Secrecy

Canada, like other Commonwealth countries, has inherited the British tradition of administrative secrecy. At the federal level, the most general legal provision for encouraging the secrecy of administrative information is the secrecy oath required of all public servants by the Public Service Employment Act. Each public servant swears that in his employment he "will not, without due authority..., disclose or make known any matter that comes to [his] knowledge by reason of such employment."[2] Interpreted strictly, this means that a public servant may not release any document or information without permission from his political minister, and that the government enjoys complete

1 This chapter is based on my report on Canada in the forthcoming Administrative Secrecy in Developed Countries, op. cit., ante, p. 19, note 11.

2. Public Service Employment Act, 1967, Schedule C. My italics.

discretion regarding what administrative information is to be released. A considerable number of federal laws also have provisions requiring secrecy, mainly for information held on individual corporations and persons, to protect their privacy. Notable examples are the Income Tax Act and the Statistics Act. The most important provisions for secrecy, however, are those designed for the protection of national security in the Official Secrets Act. These are supplemented by certain sections of the Criminal Code that define related offences, such as treason, sabotage, sedition, breach of trust by a public officer, making use of official papers, and preparation to commit an offence under the Official Secrets Act.

The Act itself has a long legislative history. Between 1911 and 1920 the British Official Secrets Act of 1911 was applied to Canada. But when a new British Act was passed in 1920, it was not made applicable to Canada. The 1911 Act continued in force as part of the law of Canada, until it was displaced by Canadian legislation: the Official Secrets Act of 1939. This Act, as amended, is much the same as the British law of 1911 as changed in 1920.

The British and Canadian Secrecy Acts are mainly designed to cover spying with the intent of passing on secret government information to a foreign agent or government. But as Professor Maxwell Cohen has pointed out, section 4 of the Canadian Act (and section 2 of the British Act) embrace almost any form of information obtained in the course of service or contract of employment with the government and

then passed on without authority to any other person, "whatever his status and whatever the purposes of the transfer of information may be, [and] however unclassified the information may be."[3] In both the British and Canadian Acts the onus of proof is on the accused if a limited case on the facts has been made out by the Crown, and a court has power to order the proceedings held so that the public is excluded from the trial (though not from the passing of sentence). The Acts also allow a defendant's purpose in revealing information to be implied from his conduct or known character. Any evidence of communication or attempts at communication with a foreign agent are prima facie evidence of his purpose.

There are two important differences between the British and Canadian statutes. Section 2 of the British Act has been drafted and interpreted so as to mean that the unauthorized communication of any official information is illegal, while under section 4 of the Canadian Act the criminal illegality is confined to any "secret" official document or information. The other difference is that the Canadian Act provides a greater penalty for the non-espionage crime of unauthorized communication: the maximum penalty in Britain is imprisonment for two years, while in Canada it is for thirteen years. Since the second world war, however, prosecutions in Canada have been much fewer than in Britain.

3 Thomas M. Franck and Edward Weisband, eds., Secrecy and Foreign Policy (New York: Oxford University Press, 1974), p. 357.

Both the British and Canadian Official Secrets Acts have been criticized as too sweeping, and in 1969 the Royal Commission on Security proposed a complete revision of the Canadian Act,[4] as did the Wall report, prepared in the Privy Council Office for the government in 1974.[5]

Until the publication of the report of the Royal Commission on Security little was known about the procedures for the classification of security documents or for the clearance by the police of public employees who have access to such documents, because these procedures themselves were regarded as confidential. It was therefore impossible for the public to find out whether they were adequate or fair. The Commission's report itself was published in abridged form because, the government stated, certain material had to be removed for security reasons.

The report revealed that the government had adopted the four security classifications that were being used widely in other western countries:

4 Royal Commission on Security, Report (Abridged) (Ottawa: Queen's Printer, 1969).

5 D.F. Wall, The Provision of Government Information (Ottawa: Privy Council Office, 1974); printed as an appendix in Parliament, First Session, Thirtieth Parliament, 1974-75, Standing Joint Committee on Regulations and other Statutory Instruments, Minutes of Proceedings and Evidence, Issue No. 32 (Ottawa: Queen's Printer, 1975), pp. 30-71. The Wall report has also been made available as a separate document by the Privy Council Office.

Top Secret, Secret, Confidential and Restricted. Also published in the report for the first time (pp. 69-71) were the government's official definitions of these classifications, its examples of the types of documents to be included in each, and its statement of general principles governing the classification of documents. In the definitions, the distinction between the top three categories lies in the strength of the wording used. Thus Top Secret documents, information and material are ones the unauthorized disclosure of which "would cause exceptionally grave damage to the nation". In the Secret category are ones the unauthorized disclosure of which "would endanger national security, cause serious injury to the interests or prestige of the nation, or would be of substantial advantage to a foreign power". The Confidential category includes ones the unauthorized disclosure of which "would be prejudicial to the interests or prestige of the nation, would cause damage to an individual, and [sic] would be of advantage to a foreign power."

The definition of Restricted is very vague. It simply specifies material which "should not be published or communicated to anyone, except for official purposes". Thus no guidelines are given for documents to be classified as Restricted. Indeed, this category is so broad that it could include any information. Both the Royal Commission (p. 115) and the Wall report (p. 69) have recommended that this classification should be abolished, as it was in the United States in 1963.

Although the emphasis in the definitions of the top three classifications is on national security, among the examples given of matters to be marked and kept Secret are all records of discussions of the Cabinet and Cabinet committees, and particulars of the national budget prior to its official release. Of the four examples of matters to be marked Confidential, only one has to do with national security (political and economic reports which would be of advantage to a foreign power). The other three are:

a) Information of a personal or disciplinary nature which should be protected for administrative reasons;

b) Minutes or records of discussions of interdepartmental committees when the content of such minutes or records does not fall within a higher category;

c) Private views of officials on public events which are not intended to be disclosed.

As the Wall report has pointed out (p. 46), "The regulations currently in force fail to delineate adequately information procedures used against espionage from procedures used to safeguard information which must be confidential for a myriad of other reasons."

The Wall report has also noted that procedures used for the security clearance or screening of personnel have similarly failed to make this distinction. They are being applied to increasing numbers of public servants without discrimination, the only test being whether an employee has or is likely to have access to "classified" information. The procedures in such cases involve fingerprinting, a detailed questionnaire and a search by the federal police of their records on criminals and subversives. In most cases where there is

to be access to Secret information, the police (or other competent authorities) also make an investigation of the employee's (or prospective employee's) past and present associations and habits of life. On the basis of the police report, the employing department or agency then makes a judgement on whether clearance can be granted. Since these procedures were adopted during the period of the "cold war" mainly for the clearance of persons who had access to security documents, they are too elaborate and in many cases unnecessary for the clearance of persons who have access to other types of secret and confidential information. The Wall report found that "apart from the dubious relevance of these measures in many areas of government administration, and their inhibiting effect on the provision of information to the public, as well as on prompt staffing, there was a good deal of concern as to their cost" (p. 46).

Although the government's general principles governing the classification of documents recognize that the "classification appropriate to a document may alter with the passage of time", there is no general system for the downgrading or declassification of documents. Downgrading is left to the discretion of departments, which are merely enjoined by the principles to "arrange to review classified documents as and when required", though at the same time "it is strongly recommended that the originating departments indicate wherever possible, either at the time of issue or later, that a document may be downgraded after a given date or event". The Royal Commission noted (p. 71) that there is an obvious tendency, especially

on the part of more junior officials, to "play safe" and to classify too much or to overclassify, and that overclassification "was a general current problem". Yet, because of the administrative difficulties involved, it recommended against the adoption of a general system of downgrading and declassification, even though it recognized a need to release classified records as soon as possible for purposes of public appraisal and historical research. One must agree that such a system is not worth the effort and cost involved, unless the records are to be fully declassified and made publicly available at an early date.

2. The Trend Toward Openness

In recent years Canadians have become increasingly aware that the principle of discretionary secrecy is incompatible with the right of the public to information in a democracy. The public service oath and the Official Secrets Act, both of which imply that officials must keep administrative matters secret, are inconsistent with the fact that government departments pour out a torrent of information in an attempt to make the public understand the complex operations of modern government. The inconsistency of this situation has given rise to a number of "leaks" of reports and information by federal employees on subjects which many people felt should never have been kept secret in the first place. Because the action of those employees has been supported by a large segment of the press and the public, the federal

government has engaged in considerable soul-searching about its traditional principle of discretionary secrecy. Partly as a result, in recent years there has been a strong trend at the federal level in the direction of greater openness.

The year 1969 probably marks the beginning of this trend. In that year the government's Task Force on Government Information issued a fat two-volume report on all aspects of government information. It criticized the tradition of administrative secrecy, and quoted at length my article of 1965 proposing Canada's adoption of the Swedish principle of openness.[6] It also recommended a much more positive information and publicity effort and the creation of a central information and publications agency, Information Canada, which the government proceeded to establish.

3. The Release of Records in the Public Archives

In 1969, too, Prime Minister Trudeau announced that the government was adopting a policy of transferring to the Public Archives and releasing

6 Report: To Know and Be Known, Vol. II: Research Papers (Ottawa, Queen's Printer, 1969), pp. 25-31. My article was "How Much Administrative Secrecy?" Canadian Journal of Economics and Political Science Vol. 31, No. 4 (November 1965), pp. 479-498, with a comment by K.M. Knight and my reply in Vol. 32, No. 1 (February 1966), pp. 77-87.

most official records after thirty years. The government, he said, would "make available for research and other public use as large a proportion of the records of the Canadian Government prior to July 1, 1939, as would be consistent with the national interest".[7] However, this would not include records "whose release might adversely affect Canada's external relations, violate the right of privacy of individuals, or adversely affect the national security".[8] All other departmental records over thirty years old would be transferred to the Public Archives. In addition, departments and agencies would be encouraged to transfer to the Archives records less than thirty years old, and to make them available with the permission of the ministers concerned, after consultation with the Dominion Archivist. An Advisory Council on Public Records, which includes the Dominion Archivist and departmental representatives, worked on implementing this announcement, and in 1973 the government issued to all departments Cabinet Directive No. 46, "Transfer of Public Records to the Public Archives and Access to the Public Records Held by the Public Archives and by Departments".

The way in which administrative documents are held has a great deal to do with their accessibility. Thus, records held in government departments are likely to be organized for the convenience of the

7 As quoted in the Task Force's Research Papers, op. cit., supra, note 6, p. 26.

8 Ibid.

department in using them, while if they are held by Archives the emphasis is likely to be on convenience for use by the outside public. From this point of view Cabinet Directive No. 46 takes on additional importance, because it urges departments to transfer documents that are even less than thirty years old. Thus it states that "to facilitate research all departments should transfer their public records to the Public Archives of Canada as soon as practicable". However, it specifies that a public record shall not be transferred to the Public Archives if:

a) it is an exempted record, the release of which would be contrary to law;

b) it is a record of a department that, in the opinion of the Deputy Head of that department, is or may be necessary for the efficient operation of that department;

c) it contains information the disclosure of which, in the opinion of the appropriate Minister, would be prejudicial to the public interest.

The Directive also specifies that access to even a transferred record which is less than thirty years old is to be given only with the permission of the appropriate minister, in accordance with terms and conditions established in consultation with the Dominion Archivist. Access to records retained in a department is to be given "only with the permission of and in accordance with terms and conditions established by the appropriate Minister", and no department is to permit access to any record "in respect of which the department or agency that originated the record would refuse access."

Where the deputy head of a department is of the opinion that a transferred record is an "exempted" record, he is to advise the Dominion Archivist of this. The implication of this provision is that the Dominion Archivist must not release records less than thirty years old which are exempted. An exempted record is defined in the Directive as a public record:

(a) that contains information the release of which

(i) would be contrary to law,

(ii) is restricted pursuant to an agreement made between the Government of Canada and any other government,

(iii) might be considered by any government to be a breach of faith on the part of the Government of Canada,

(iv) might embarrass the Government of Canada in its relations with any other Government, or

(v) might violate the right or privacy of any individual,

(b) that relates to security and intelligence; or

(c) that is a personnel record, except that a personnel record ceases to be an exempted record on the expiration of the period of 90 years from the date of birth of the employee with respect to whom the record was made.

It will be noted that officials are given greater discretion to withhold records by the more permissive word "might" rather than "would" in categories (iii), (iv) and (v) above, and by the vague words "relates to" in (b).

4. Access by Courts and the Publication of Regulations

It should also be mentioned that in 1970 Parliament approved a

Federal Court Act, which clarified the power of the courts to compel the production of official documents, and in 1971 it passed the Statutory Instruments Act, which ensured the publication of all government regulations and many related statutory instruments. Canada has inherited the British doctrine of Crown privilege, or ministerial discretion to refuse a request for the production of documents before an open court. Also, Canada's courts have been heavily influenced by British judicial decisions, which until recently were willing to accept without question a minister's statement that on grounds of public interest a government document or testimony should not be disclosed to litigants or given to a defendant. Even before 1970, however, Canada's courts were beginning to demand more specific grounds, such as interests of national security, for a government's refusal to produce documents.

In 1970 the Federal Court Act, which created a new Federal Court to replace the old Exchequer Court, clarified and limited the extent of Crown privilege. It gave to a presiding judge the power to decide whether documents claimed by the government to be privileged must be submitted as evidence, except when a minister certifies that the production of a document "would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada". However, the exceptions have been criticized as too broad, thus giving the ministers too much discretionary power.

Regarding the Statutory Instruments Act of 1971, an earlier Regulations Act (1950) had already required all government regulations to be published in the Canada Gazette. The difficulty was that executive instruments were issued in many different forms (orders-in-council, regulations, minutes, directives, etc.), and it was possible for the government to refrain from publishing some of its delegated legislation simply by not defining it as a "regulation". The new law clarified the types of regulations that could remain unpublished, or published only in part, on such grounds as national security. It also provided a more systematic mechanism for parliamentary scrutiny, while the Federal Court Act provided a means of judicial review. In introducing the Statutory Instruments Bill, the Minister of Justice stated his opinion that it was "a significant step toward a more open society in Canada".[9] It is still possible, however, for subordinate legislation or executive decisions that are in the nature of regulations to be withheld from publication by not being defined as "regulations".

5. The Guidelines for Release to Parliament

In 1973 the government issued to the departments a set of guidelines for the release of documents to Parliament, as Cabinet Directive No.

9 House of Commons Debates, 25 January 1971.

45, "Notices of Motion for the Production of Papers". The Directive was then tabled in the House of Commons and briefly debated. The significance of this Directive is that it stated officially, if not clearly, that as a general principle departments should make public as much information as possible. Also, for the first time ministers and senior officials had a general guide to follow in deciding whether a particular paper or document, if requested, should be released to Parliament. Moreover, since no such guide existed for the release of documents and information generally to the public, the guidelines (along with Directive no. 46) are now being used for this purpose as well.

The actual wording of the General Principle is as follows:

> "To enable Members of Parliament to secure factual information about the operations of government to carry out their parliamentary duties and to make public as much factual information as possible consistant [sic] with effective administration, the protection of the security of the state, rights to privacy and other such matters, government papers, documents and consultant reports should be produced on Notice of Motion for the Production of Papers [in Parliament] unless falling within the categories outlined below in which case an exemption is to be claimed from production." 10

It should be noted that the General Principle states only that government papers "should" (not "shall") be produced, and that an exemption "is to" (not "should" or "may") be claimed from production. Also, the wording and punctuation are so awkward that they seem to

10 Standing Joint Committee, op. cit., supra, note 5, Issue No. 13, p. 28.

imply that it is not departments but members of Parliament who are to "make public as much factual information as possible".

The Directive then made a detailed specification of the types of documents for which "an exemption is to be claimed". First, it listed sixteen categories:

1) Legal opinions or advice provided for the use of the government.

2) Papers, the release of which would be detrimental to the security of the State.

3) Papers dealing with international relations, the release of which might be detrimental to the future conduct of Canada's foreign relations; (the release of papers received from other countries to be subject to the consent of the originating country).

4) Papers, the release of which might be detrimental to the future conduct of federal-provincial relations or the relations of provinces inter se; (the release of papers received from provinces to be subject to the consent of the originating province).

5) Papers containing information, the release of which could allow or result in direct personal financial gain or loss by a person or a group of persons.

6) Papers reflecting on the personal competence or character of an individual.

7) Papers of a voluminous character or which would require an inordinate cost or length of time to prepare.

8) Papers relating to the business of the Senate.

9) Papers, the release of which would be personally embarrassing to Her Majesty or the Royal Family or official representatives of Her Majesty.

10) Papers relating to negotiations leading up to a contract until the contract has been executed or the negotiations have been concluded.

11) Papers that are excluded from disclosure by statute.

12) Cabinet documents and those documents which include a Privy Council confidence.

13) Any proceedings before a court of justice or a judicial inquiry of any sort.

14) Papers that are private or confidential and not of a public or official character.

15) Internal departmental memoranda.

16) Papers requested, submitted or received in confidence by the government from sources outside the government. 11

The Directive also provided that "Ministers' correspondence of a personal nature, or dealing with constituency or general political matters, should not be identified with government papers and therefore should not be subject to production in the House". And it concluded with guidelines for the preparation and release of studies done for the government by outside consultants. Such studies are to be divided into two parts, one comprising the facts and the analysis, and the other the recommendations, to facilitate the early release of the former. If the study is comparable to "the kind of investigation of public policy for which the alternative would be a Royal Commission", both parts are to be released, but if it is "identifiable and comparable to work that would be done within the Public Service", the recommendations are exempt from production and the facts and analysis

11 Printed in Standing Joint Committee, op. cit., supra, note 5, Issue No. 13, pp. 28-29; and in House of Commons Debates, Vol. 117, No. 51, p. 2288 (15 March 1973).

may or may not be released. Prior to engaging the services of a consultant, ministers are to decide in which category the study belongs, and in cases of doubt are to seek the advice of their colleagues. It will be noted that the distinction between the two categories is very vague, and that ministers still have full discretion over the release of the second category. However, the guidelines do facilitate the release of the facts and analysis in this category.

Considering the pressing need for greater administrative openness in Canada, the Directive is far from being a giant step toward a general right of access. As I argued in my evidence before the Joint Committee on Regulations, it should instead be regarded as a weak-kneed and faltering step.[12] It lists so many exceptions in such sweeping terms that the exceptions almost swallow the rule, or general principle. Also, it is basically intended as a guide to the production of papers in Parliament rather than the release of information generally. More serious, it is in the form of a cabinet directive rather than legislation, and therefore is not binding on the government. The decision about whether a particular document can be withheld because it falls within one of the sixteen exemptions is still completely at the government's discretion. And there is no right of appeal against such a decision to an independent arbiter

12 Ibid., Issue No. 15, p. 18.

such as the courts or an ombudsman.

6. The Joint Committee and the Green Paper

Soon after the Directive was issued in 1973, the government referred it for study to Parliament's Standing Joint Committee on Regulations and other Statutory Instruments, along with a private member's bill providing for a public right of access to documents. This bill (C-225) had been introduced in the House of Commons by Mr. Gerald Baldwin, House Leader of the Opposition. Variations of the bill had been submitted in earlier years by Mr. Baldwin and others, but as is usual with such private member's bills, the government had ignored them.

The Joint Committee began its study of these documents at the end of 1974, and since then has been calling expert witnesses before it, including ministers and senior public servants, and has been presenting reports to Parliament. In December 1975 it tabled a report approving in principle the concept of legislation relating to freedom of information. This report was approved by the House of Commons in February 1976, and in June 1977 the government committed itself to introducing some kind of bill on the subject by issuing a Green Paper, Legislation on Public Access to Government Documents,[13] which

13 Issued by Honourable John Roberts, Secretary of State (Ottawa: Supply and Services Canada, 1977), pp. 39.

presented arguments for alternative provisions in such a bill.

The tenor of the discussion in the Green Paper, however, indicated that the government was likely to introduce a weak law. Thus, the document favoured a broadly worded list of exemptions and opposed a right of appeal to the courts, even though such a right is an integral part of the laws in Scandinavia and the United States. For this reason, the Green Paper has been strongly criticized, particularly by the Canadian Bar Association and by a research study prepared for it by Professor Murray Rankin.[14]

In December the Green Paper was referred to the Joint Committee for study, and in June 1978 the Committee reported its recommendations on the Green Paper's proposals.[15] These recommendations made clear that the Committee favoured a strong law. It proposed strong enforcement provisions comparable to those in the American law, and it disagreed with the broad wording of the Green Paper's exemptions and its preference for a final decision by a minister on an appeal. Thus it opposed the prefacing of each exemption by the word "might". The Green Paper had suggested an exemption for documents the disclosure of which

14 T. Murray Rankin, Freedom of Information in Canada: Will the Doors Stay Shut? (Ottawa: Canadian Bar Association, August 1977), pp. 155.

15 Minutes of Proceedings and Evidence, Issue No. 34, Third Session of the Thirtieth Parliament, 1977-78 (June 27, 1978), pp. 3-12.

"might be injurious..." The Committee felt that this test was too broad and recommended that the wording should instead be "could be reasonably expected to be..." It also proposed a more restricting wording for each of the exemptions, in ten areas: national defence, international relations, federal-provincial relations, cabinet documents, policy advice, law enforcement, personal privacy, legal opinions, commercial or financial information, and statutory exemptions. And it recommended that departments be given the power to release a document even if it falls within an exempt category.

On the question of appeals, it proposed a combination of two of the alternatives discussed in the Green Paper: an Information Commissioner and appeal to the courts. The Information Commissioner would have only an advisory power, like an ombudsman, but if the Commissioner's recommendation that a document should be released was not accepted by a department or minister, an appeal could be made to the courts for a final decision.

The advantage of having an Information Commissioner as an intermediate step is that he would settle most cases before they went to court, thus saving time and money. In support of a final appeal to the courts, the Committee agreed with Professor Rankin's contention that

> "no constitutional, legal, or practical impediment stands in the way of judicial involvement in the adjudication of freedom of information questions", and that the argument that ministerial responsibility precludes it is a time-worn dogma that collapses upon an examination of English and Canadian constitutional precedents. His study concludes that to hand the final decision on disclosure of information to the

> unreviewable discretion of a Minister "who is hardly a disinterested party" would make a sham of any system of access to Government documents. [16]

It appears that the federal government will not accept this view, however. On October 10, 1978, in reply to Gerald Baldwin, who sought the House's approval of the Committee's report, Secretary of State John Roberts stated that the government planned to introduce access legislation early in the new parliamentary session. He said that the legislation will include even narrower exemptions than those proposed by the Committee, but indicated that ministers rather than the courts will have the final say on whether a document is exempt. Appeal to the courts, he said, is cumbersome and costly and "it is to my mind something to be avoided".[17]

7. The Ombudsman and Access to Personal Files

A special officer of the legislature appointed at the provincial level in recent years is the Ombudsman, who investigates complaints from the public against the administration. Under a system of discretionary secrecy, an individual adversely affected by a decision may be given

16 Ibid., p. 9

17 Kittey McKinsey, "New information law promised for session", Ottawa Citizen (October 11, 1978).

no information about it. Though he may have reasonable grounds for a complaint, he has no right of access to the documents in his case, and therefore may not be able to establish these grounds. One of the great values of an ombudsman is that he is given the power of access to administrative documents and information on behalf of the complainant, and can get behind the walls of secrecy. Since 1967 an ombudsman has been appointed in nine of the ten provinces (all except Prince Edward Island).[18]

Such an officer does not yet exist at the federal level, however. Just before the federal election of October 1972, the Minister of Justice announced that the government intended to create a commission for the protection of human rights, which would include the powers of a parliamentary ombudsman to investigate complaints against the administration. In July 1975 the government introduced a law to create such a commission, but it does not include the functions of an ombudsman.

The law does, however, give citizens the right to inspect personal files that the government may be holding on them, and to file a correction or counter statement to any information on file. A file

18 See Janice Tyrwhitt, "The Ombudsman: Canada's Trouble Shooters of Last Resort", Reader's Digest, Canadian Edition, Vol. 107, No. 64 (August 1975), pp. 39-43, and my The Ombudsman Plan (Toronto: McClelland and Stewart, 1973), pp. 97-105.

may be withheld if its subject-matter concerns any one of a long list of exemptions, but there is provision for appeal to a Privacy Commissioner who, like an ombudsman, can make a recommendation. This law was passed in 1977 as the Canadian Human Rights Act, and went into effect in March 1978. Also, on April 5, 1978 the government introduced a bill (C-43) for a separate ombudsman plan, based on a favourable report that year by a committee of senior officials.[19]

Under this bill, the Privacy Commissioner would become an assistant ombudsman. The ombudsman would have strong powers of access to information, and in the case of a minister's refusal of a request for a document, he could, like litigants, apply to the Federal Court for a determination. But he and his officers would be bound to confidentiality during the course of an investigation, and they would not be allowed to disclose information in a list of categories similar to the exemptions in the 1973 guidelines on the release of documents to Parliament. This list, too, introduces each category with the broad words "might" or "would be likely to" rather than "would" (e.g., "might be injurious to...federal-provincial relations").

19 Government of Canada, Committee on the Concept of the Ombudsman, Report (Ottawa, July 1977), pp. 69.

B. The Other Provinces

Because Canada is a federal state, each of the provincial governments has its own administrative structure, and each has the power to control public access to its own administration. Local governments are under the exclusive jurisdiction of the provincial legislatures, and hence the laws governing public access to local administration are provincial laws which vary somewhat from province to province. Since the provinces have inherited and operate under basically the same parliamentary system as that of the federal government, the tradition of administrative secrecy has been much the same at the provincial and local levels.

During the last century, when the colonies of British North America won responsible government in 1848, and established the principle that the executive government, or Cabinet, must at all times be supported by a majority in the legislature, it was easy for their governments to maintain the previous practice of administrative secrecy for their own convenience, as governments had done in Britain. This practice was strongly supported by the concurrent development of contending political parties and a system of government and opposition, which virtually required a government to conduct its proceedings in secret so as not to reveal its hand to the opposition. It was also buttressed by the adoption of the British practice of civil service anonymity, and by the decentralization during this century of Canada's federation, with the result that negotiations between the central and provincial

governments tend to take on the character of secret international negotiations.

Another factor supporting administrative secrecy at the provincial as well as the federal level is Canada's relatively competitive economy. An accepted practice of economic competition is for businesses to keep information secret from one another and from their unions of employees. Besides encouraging an atmosphere of secrecy in society, this had led the federal and provincial legislatures to pass laws which forbid the release of information that governments may hold on individual business firms. Also, Canada has a tradition of personal privacy, which is closely related to its democractic tradition of the freedom and dignity of the individual. Although the courts have not developed a right to personal privacy as they have in the United States, certain provincial laws, as at the federal level, have for many years forbidden the release of administrative information on individuals.

As a result of all these factors supporting secrecy, the provincial governments have until recently adhered tenaciously to the principle of discretionary secrecy. Most of them have a secrecy oath for public servants similar to the one at the federal level, and there are no guidelines showing what documents can be legitimately released. Hence, provincial public servants are confused about what to release, and when in doubt play it safe by withholding documents and information. As the authors of a comprehensive report on Government Publishing in

the Canadian Provinces have observed:

> "Fundamental to the whole problem [of access to provincial documents] is the issue of administrative secrecy...There seem to be no clear-cut reasons for most officials' decisions concerning releases of processed documents. An item denied the researcher in one office may be thrust upon him in the next. One man may refuse to release a document containing data readily available in half a dozen annual reports; another may volunteer materials reflecting ongoing policy discussions. Amongst many administrators troubled by this problem, the debate opened by Professor Rowat is being carried on with some intensity." 20

It should be noted that there is less reason for secrecy at the provincial than the federal level, because the provinces are not responsible for the fields of foreign affairs, defence or national security, where many matters must be kept secret and where federal public servants are subjected directly to the Official Secrets Act.

1. Recent Developments

As part of the world-wide movement toward greater openness by democratic governments, in recent years significant developments have taken place in this direction not only in Ontario but also among the other provinces. Private members' bills providing for a public right of access to administrative documents have been introduced in the

20 A. Paul Pross and Catherine A. Pross, Government Publishing in the Canadian Provinces (Toronto: University of Toronto Press, 1972), pp. 14-15.

legislatures of most of the provinces. Also, the governments of three of the provinces -- Nova Scotia, Prince Edward Island and New Brunswick -- have introduced access bills, and these have now been approved by the legislatures in Nova Scotia and New Brunswick. A survey I conducted in the fall of 1977 showed that the matter had thus come before the legislatures in all but two of the other ten provinces -- Quebec and Newfoundland. It should also be mentioned that in Quebec a report on the press prepared by officials from the Ministry of Communications in 1977 (but not released until 1978) recommended that "government documents be considered of public interest and therefore released, except for well-identified exemptions".[21]

Besides the private member's bill on public access in Ontario, first introduced in 1975 by Mr. MacDonald, such bills have been introduced in Manitoba by Mr. Axworthy, in Saskatchewan by Mr. Cameron, in Alberta by Dr. Buck and in British Columbia by Mr. Gibson and Mr. Wallace. The Gibson-Wallace bill also provides for open meetings of provincial boards and local councils, and earlier open-meeting bills had been introduced in B.C. by Mr. MacDonald (1972) and Mr. Gardrom (1973). The access bills incorporate the basic principles of the American Freedom of Information Act, except for the Axworthy bill, which does not provide a declaration in favour of openness or a right

21 Comité de travail sur la concentration de la presse écrite, Rapport: de la précarité de la presse ou le citoyen menacé (Québec: Ministère des communications, 1977), p. 109. My translation.

of access, but only provides for an appeal to the courts when a document is refused; and the Gibson-Wallace bill, which, like Mr. MacDonald's bill in Ontario, provides for an appeal to the provincial ombudsman instead of the courts.

Since private members' bills are given little consideration in the provincial legislatures and are rarely passed, more significant are the government bill in Prince Edward Island and the Acts passed in Nova Scotia and New Brunswick. These are particularly interesting because of the different ways in which they treat the problem of who should make the final decision on an appeal.

2. Prince Edward Island

Prince Edward Island's Access to Public Documents Act was introduced by the Minister of Justice as Bill No. 53 and given first reading in May 1977, but was not passed by the legislature and appears to have been dropped. The Act has a misleading title because it establishes a right to copies of documents but not a right to inspect original documents. An applicant must therefore be able to identify the document he wants and be prepared to pay the prescribed fee, and he must apply on a prescribed form to the Clerk of the Executive Council. Also, the Act makes no general statement of principle that openness is to be the rule.

An unusual feature of the Act is that it provides for an Information Commissioner to make final decisions on appeals. The Commissioner is to be appointed as an officer of the legislative assembly by the government on the nomination of the Premier and the Leader of the Opposition. He may be removed from office only by a vote of two-thirds of the members, and is required to make an annual report to the assembly. The Commissioner's decision on an appeal is final, he may order the release of a document, and a privative clause prevents any appeal to the courts. The regulations under the Act are to be made only after consultation with the Commissioner.

Such an appeal mechanism was one of the alternatives discussed in the federal Green Paper of June 1977. It has been criticized because it gives an appointed official the power to overrule the decision of a minister, and because it closes off appeal to the courts.

3. Nova Scotia

With the passage of the Freedom of Information Act in May and its proclamation in November 1977, Nova Scotia became the first province, and the first jurisdiction in the Commonwealth, to establish a public right of access to government documents. A noteworthy feature of the Act is that it also incorporates a right to personal privacy regarding government-held information. It provides the right to inspect, correct, and limit distribution of information contained in personal

files. Such information may not be disclosed, even to another arm of government, without the consent of the person concerned. The Act further provides that any agency of government must disclose the existence of all data banks where such information is kept, and it prohibits the selling or renting of a person's name or address for mailing without permission.

Another unusual feature of the Act is that it gives a list of types of information that must be made available, as well as a list of categories to which a person must not have access. The wording of the Act makes clear that in a case of conflict between the two lists, the secrecy list takes priority. Also, most of the secrecy exemptions are couched in broad language, such as information that "might" (rather than "would") influence particular negotiations, or "would be likely to" (rather than "would") disclose a particular type of information. For these reasons, the first reading of the bill produced an outcry from some citizens' groups, who feared that, because the Act spelled out a limited list of what information was required to be released and an overriding list of what must be withheld, information which had been made available in the past might now be withheld. The legislature therefore passed an amendment providing that the Act would not restrict access to material that had been available "by custom or practice" in the past.[22]

22 See Tom Riley, "Freedom of Information: The N.S. Law", Civil Service Review Vol. 50, No. 30 (September 1977), p. 29.

It is also noteworthy that the Act permits a request for "information" rather than "documents", and this request can be made in the first instance either in person or by telephone. It is only if such a request is refused that a request must be made in writing to the deputy head of a department. But then the request must "identify the material requested precisely". As already pointed out, this type of provision is a very limiting one, particularly where there is no requirement that departments must keep registers of documents in a form suitable for the public to consult.

The Act does, however, contain some strong provisions. For instance, a written request for information must be answered within fifteen working days. If only part of the information requested is exempt from disclosure, the remainder must be disclosed. If a written request for information is denied, the applicant must be advised in writing of the reasons and of the appeal procedure.

The most controversial aspect of the Act is the mechanism for appeals. An appeal from the deputy head's decision must first go to the minister, and if the minister upholds the denial, an appeal may be taken to the legislature, where it must be presented by a member. The theory behind this procedure is that it is supposed to preserve ministerial responsibility to the legislature, while an appeal to the courts is said to interfere with ministerial responsibility. But it is obvious that the minister will be inclined to uphold the decision of his own deputy head, and indeed will very likely have influenced

the decision in the first place, so that in a sense the minister is a judge in his own case. Furthermore, if the government is supported by a majority in the legislature, an appeal to that body is not very likely to overturn the minister's decision. This appeal procedure vitiates one of the main objects of the right to force the production of documents: to prevent a minister from withholding information for personal or party advantage, or to protect his officials rather than the public interest.

4. New Brunswick

New Brunswick's Right to Information Act was approved on June 28, 1978, but has not yet been proclaimed. It was preceded by a 35-page White Paper, "Freedom of Information: Outline of Government Policy Pertaining to a Legislated Right of Access by the Public to Government Documents", which the Premier tabled in the legislative assembly in June 1977. This paper based much of its factual information and argumentation on a background paper that Ontario's Attorney-General had tabled in the Ontario legislature in March of that year, entitled "Freedom of Information, the Right of Privacy and Government Information Practices: an Outline of the Issues".

Both papers referred to Sweden and the United States as the only examples of countries with access legislation. Both took the line that the constitutional systems of Sweden and the United States were so

different from our parliamentary system that similar access legislation might interfere with ministerial responsibility, and argued that appeals to the courts in the United States were too numerous and costly. These arguments were used in particular to cast doubt on the wisdom of providing for an appeal to the courts in Canada. Neither paper mentioned that Finland, Denmark and Norway have parliamentary systems of government much like ours, with ministers responsible to Parliament for the administration of their departments. And neither mentioned that in Sweden, as in the other Scandinavian countries, there is a right of appeal to the ombudsmen and that most appeals go to them for a recommendation to a minister, rather than to the courts for a binding decision on a minister. Thus in Scandinavia ministerial responsibility is preserved in most cases, and the number and cost of court reviews is reduced. Yet the courts are retained as an ultimate protection against ministers withholding information for their own personal or partisan benefit. Not having taken these considerations into account, and having rejected Nova Scotia's provision of an appeal to the legislature for reasons already given, the New Brunswick White Paper lamely proposed an appeal to the Minister of Justice, whose decision would be final, while the ombudsman would be appointed as an Information Auditor to report annually on the Act to the legislature.

The Act itself, however, wisely ignores this proposal. It requires instead that a request for information must go to the appropriate minister and that an appeal from his decision may go to either the

ombudsman or to a judge of the Supreme Court. Where the appeal goes to the ombudsman, he will, in accordance with the usual powers of an ombudsman, make a recommendation to the minister, who must again review the case and make another decision. If still dissatisfied, the applicant can then appeal to a judge of the Supreme Court who has power to order the minister to grant the request for information.

It can be seen that this procedure has the essence of the Scandinavian one, by allowing appeals to go to either the ombudsman or the courts. However, it does not make use of the ombudsman's normal functions to avoid a large number of appeals going to the ministers and to the courts. The ombudsman normally receives complaints against officials and makes recommendations to them, their superiors or the minister before the minister becomes concerned. Often a case is settled without the minister having to become involved. The requirement that a written request for information must go to a minister is severely limiting, and is likely to overload the minister. Moreover, since an appeal to the ombudsman will involve the minister in making a decision on the same case twice, applicants are likely to short-circuit the cumbersome ombudsman route and go directly to a Supreme Court judge, where they have hope of getting a favourable final determination much more quickly. If the requirement that a request must go to a minister were removed, the burden on ministers would be lifted, the ombudsman would revert to his normal role in the handling of complaints, and the number of appeals going to a judge would be greatly reduced.

In other respects the Act contains some good provisions. Unlike the Act for Nova Scotia, it does not contain a limiting list of types of information to be released. While the list of matters to be withheld is very similar, the language has been tightened to reduce the scope for official discretion by using the word "would" (instead of "might" or "would be likely to") for each of the secrecy categories. Also, if the applicant cannot specify the document he wants, he may instead "specify the subject-matter of the information requested with sufficient particularity as to time, place and event to enable a person familiar with the subject-matter to identify the relevant document". As in the American federal and Nova Scotia Acts, there are time limits for a reply at each step in the procedure, and non-secret portions of a document must be released. Where an appeal to a Supreme Court judge is successful, the judge must award costs in favour of the applicant, and if it is not successful, the judge may do so if he considers this to be in the public interest.

Unlike the Act for Nova Scotia, however, New Brunswick's Act does not begin with a preamble giving a general statement in favour of the principle of public access. Moreover, like all other provincial bills and Acts to date, the secrecy categories are too briefly worded and too broad, and some of them seem to be unnecessary.[23]

23 The actual wording of the exemption section is as follows:

6. There is no right to information under this Act where its

(cont'd overleaf)

5. Local Government

At the local level of government there is somewhat more administrative openness in Canada than at the higher levels. This is mainly because local government does not have the parliamentary system whereby a government supported by a majority party wishes to keep its affairs and proceedings secret from the opposition. Provincial laws usually require the regular meetings of municipal councils and school boards to be open to the public, and provide a limited right of public access to municipal documents. Frequently, however, members of a municipal council or school board or their committees will meet informally in secret to discuss a matter instead of debating it at a regular open meeting. Also, provisions requiring the publication of by-laws and minutes of councils are rare, most municipal boards are not required to hold open meetings or allow inspection of their

23 (cont'd)
release (a) would disclose information the confidentiality of which is protected by law; (b) would reveal personal information, given on a confidential basis, concerning another person; (c) would cause financial loss or gain to a person or department, or would jeopardize negotiations leading to an agreement or contract; (d) would violate the confidentiality of information obtained from another government; (e) would be detrimental to the proper custody, control or supervision of persons under sentence; (f) would disclose legal opinions or advice provided to a person or department by a law officer of the Crown, or privileged communications as between solicitor and client in a matter of department business; (g) would disclose opinions or recommendations by public servants for a Minister or the Executive Council; (h) would disclose the substance of proposed legislation or regulations; (i) would impede an investigation, inquiry or the administration of justice.

records, the laws do not provide a full right of access to municipal documents, and the courts have decided that there is no common-law right to municipal records or information. Hence, the laws regulating the openness of local government ought to be reviewed and revised, as they have been in nearly all of the American states. In a recent study of access to Ontario's municipal records, F. Brent Scollie has made a number of valuable recommendations for reforming the laws and practices in Ontario.[24]

24 "Every Scrap of Paper; Access to Ontario's Municipal Records", Canadian Library Journal, Vol. 31, No. 1 (January-February 1974), p. 7.

CONCLUSION: LESSONS FROM ELSEWHERE

In its emphasis on secrecy, the government of Ontario is much the same as other democratic governments that have inherited the tradition of discretionary secrecy. For instance, all public servants in Ontario must take an extreme oath of secrecy that does not permit them to reveal any information unless "legally required" to do so.[1] "Indeed," as has been noted by the Commission on Freedom of Information and Individual Privacy in its Newsletter, "government information practices are so confidential in nature that it is difficult for citizens to assess exactly what information is being collected and held on them."[2] Thus there appears to be as great a need in Ontario as elsewhere for a strong law to reverse the traditional principle of discretionary secrecy from "Everything is secret unless it is made public by permission", to "Everything is public unless it is made

1 Justice J.C. McRuer calls the public service oath a "legal absurdity", and notes that the "legally required" provision "would appear to prohibit the private secretary to a minister from disclosing that the minister had a cold". See "Address by Honourable J.C. McRuer given at the Conference on Law and Public Affairs", February 3, 1978, at the University of Toronto, p. 5.

2 Ontario Commission on Freedom of Information and Individual Privacy, Newsletter No. 3 (August 1978), p. 11. At the same time, the Ontario government has made considerable progress in the release of historical records. It has a statutory limit of twenty years for transfer to the Archives, and in 1972 instituted a system of marking departmental documents for disclosure after specified periods of time (under Ontario Regulation 179/70). See Louis Rivietz and John Tordiff, "Administrative Secrecy and Departmental Discretion at the Federal and Provincial Levels in Canada", a paper presented to the annual meeting of the Canadian Political Science Association (June 1973), p. 17.

secret by law".

The lesson of the Swedish experience is that it is clearly quite possible to have a system where the principle has been reversed by law, and to build up a strong tradition of openness, without the wheels of government grinding to a halt. On the other hand, experience elsewhere, especially in the United States, teaches us that where such a tradition of openness does not already exist, the full establishment of the principle of openness and public access will require a radical change in law, practices and attitudes. Although practices and attitudes may not be changed sufficiently by the mere passing of a law, this is a necessary condition for the change. The adoption of a law which clearly declares a reversal of the principle of secrecy has great symbolic and dramatic value in altering both public and official attitudes. But as shown by the failure of the first American law of 1946, and the limited success of the law of 1966 until its amendment in 1974, such a law will not succeed unless it contains strong provisions for its enforcement. Public officials are too used to the old system of discretionary secrecy under which they arbitrarily withhold information for their own convenience or for fear of disapproval by their superiors, and will not change their ways unless they are required by law to do so.

Another lesson of experience elsewhere is that under a parliamentary system, where the executive government controls the introduction of legislation, the government will resist sponsoring a strong law

because this will limit its own powers and because it finds the present system of discretionary secrecy so much to its own advantage. It is significant that all of the governments in parliamentary systems that have sponsored or drafted an access law have produced weaker versions than the laws of Sweden or the United States. Such governments are likely to resort to the spurious argument that a right of appeal to the courts will interfere with ministerial responsibility to Parliament. Yet such a right increases rather than interferes with ministerial responsibility because it prevents the ministers from permanently hiding information for personal or partisan advantage. And from a broader point of view, a strong access law forces them to release more information about all of the activities for which they are responsible, thus giving Parliament, and through it the public, a better basis for controlling the government. Clearly, a strong law will be needed in Ontario if the principle of openness and public access is to be successfully and fully established.

Experience elsewhere also shows that a strong and successful law must have five main features. First, it must unequivocally declare that the general principle in government administration is to be open public access to information and that secrecy is the exception. Second, it must facilitate full and easy public access, for instance by not limiting requests to specific documents (as in Denmark and Norway) or to citizens with a personal interest in a case, and by requiring public registers of all documents and low fees for searches and copies, with the fees waived if the request is for a public purpose. Third,

it must list narrowly and specifically the types of documents that may be kept secret, must specify how long they are to be kept secret, must permit earlier release if this does not harm the public interest, and must require non-secret parts of documents to be released. Fourth, it must contain strong provisions for the enforcement of access, such as a limited time for replying to a request or appeal, and requiring reasons for a refusal, as well as penalties for non-compliance. And fifth, it must provide an easy appeal to an independent authority, including a final appeal to the courts, with the costs recoverable if the applicant wins.

If there is to be full provision for openness, the scope of the law should be broad. It should contain special provisions for access to personal files, and for their correction and control, and provisions for open meetings of governmental bodies. Unless a separate law is passed for the purpose, its scope should also be extended to cover local government.

Partly because of Cabinet control over the drafting of legislation in our parliamentary system of government, even our statutes are slanted in favour of discretionary secrecy. One of the Commission's research groups has studied Ontario's laws and has found that, of some 500 at present in force, one in every four contains some provision for administrative secrecy, and twenty-nine of them contain broad secrecy

language.[3] Hence, Ontario's laws and regulations ought to be reviewed and their secrecy provisions should be either removed or brought into conformity with the spirit of the new law on freedom of information.

3 Ibid., p. 9. And see T.G. Brown, "Government Secrecy, Individual Privacy and the Right to Know: An Overview of the Ontario Law", Research Publication of the Commission on Freedom of Information and Individual Privacy (forthcoming).

NOTE ON THE COMPARATIVE LITERATURE

There is not much literature on the subject that is directly comparative. What does exist is mainly a comparison of the laws, and gives little information on actual practices. The three main articles, which compare the four Scandinavian countries and the United States, are: John McMillan, "Making Government Accountable - A Comparative Analysis of Freedom of Information Statutes", New Zealand Law Journal (1977), 248-256, 275-280, 286-296 (reprinted in the proceedings of the Canadian Parliament's Standing Joint Committee on Regulations and other Statutory Instruments, 1977-78, May 16, 1978, 28 A: 1-43); Stanley V. Anderson, "Public Access to Government Files in Sweden", American Journal of Comparative Law XXI, 3 (Summer 1973), 419-473, which includes translations of the Scandinavian laws and regulations; and Bertil Wennergren, "Civic Information - Administrative Publicity", International Review of Administrative Sciences XXXVI, 24 (1970), 243-250. Readers may also be interested in my earlier article, "The Problem of Administrative Secrecy", International Review of Administrative Sciences XXXII, 2 (1966), 99-106, which contrasts public access in Sweden and Finland with discretionary secrecy elsewhere.

The main comparative volumes are: Itzhak Galnoor, ed., Government Secrecy in Democracies (New York: Harper and Row, 1977), which has chapters on the United States, Canada, Britain, Israel, Netherlands, West Germany, France and Scandinavia, and a comparative conclusion;

F.E. Rourke, ed., "Symposium: Administrative Secrecy, A Comparative Perspective", Public Administration Review 35 (January 1975), 1-42, which has five short articles on the United States and Britain; and Thomas M. Franck and E. Weisband, eds., Secrecy and Foreign Policy (New York: Oxford, 1974), on the U.S., Britain and Canada. A forthcoming volume is Donald C. Rowat, ed., Administrative Secrecy in Developed Countries (New York: Columbia University Press; and London: Macmillan), on Scandinavia, several countries in continental Europe, the U.K., Canada and the U.S., with a comparative survey by the editor. This volume, sponsored by the International Institute of Administrative Sciences, has already been published in French: Le Secret administratif dans les Pays développés (Montreal: Editions Arts, Lettres et Techniques; Paris: Editions Cujas; 1977).

ISBN 0-7743-3225-5